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Supreme Court of the United States

October Term, 1997

GEORGE E. BENKO,
Petitioner,

v.

JUDGES' RETIREMENT SYSTEM; JAMES NEUBECKER; GORDON LINDSAY; LYLE VAN HOUTEN; MILTON FIRESTONE,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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July 9, 1998

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151 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the constitutional guarantees of equal protection, impairment of contract and taking of property without just compensation are violated when the Michigan legislature amends the Judges Retirement System pension during Petitioner's third term of office to result in a 33% diminishment in his vested retirement benefits upon retirement.

II. Whether the Judges Retirement System has immunity under Eleventh Amendment where no state funds would be used to pay any judgment.

III. Whether due process is violated where the adjudicator, board member, prosecutor, legal advisor, and beneficiary are all acting for and employed by the attorney general for the State of Michigan.

IV. Whether the trial judge's failure to recuse himself violated 28 USCA 455(b)(iii).

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The Petitioner George Benko was the Plaintiff in the Federal District Court of Michigan and the Appellant in the Sixth Circuit Court of Appeals.

Respondents, who were Defendants in the Federal District Court of Michigan and Appellees in the Sixth Circuit Court of Appeals, are the Judges' Retirement System, James Neubecker, Gordon Lindsay, Lyle Van Houten and Milton Firestone.

TABLE OF CONTENTS

Page

Opinions below.....1, A-1 - E-3

Jurisdiction.....2

Constitutional and statutory provisions involved.....2

Statement of the Case.....7

Reasons for granting the writ.....10

Conclusion.....29

Appendix A.....A-1 - A-15

Appendix B.....B-1 - B-72

Appendix C.....C-1 - C-8

Appendix D.....D-1 - D-16

Appendix E.....E-1 - E-3

TABLE OF AUTHORITIES

TABLE OF CASES:

Almond v Boyles, 612 F.Supp 223 (D.C. N.C. 1985).....23

Campbell v Judges Retirement Board, 378 Mich 169 (1966).....17,18

Caterpillar, Inc. v Department of Treasury, 188 Mich

App 621 (Mich. Ct. App. 1991).....19,20
Concete Pipe v Construction Laborers Pension Fund, 508 U.S.--, 124 L.Ed2d 539, 113 S.Ct 2264 (1993) 21
Evans v Gore, 253 U.S. 245, 40 S.Ct.550, 64 L.Ed 887 (1920).....20
Gardner v County of Itasca, 157 N.W.2d 753 (Minn Sp Ct)(1968).....11,12,13
Hair v Tennessee, 790 F. Supp 1358 (MD Tenn 1992).....26
Halpin v. Nebrasks State Patrolmen's Retirement System, 320 N.W.2d 910(Neb. 1982).....16,17
Hammond v Baldwin, 866 F.2d 172 (1989).....28
Hickey v Pension Board of City of Pittsburgh, 378 Pa.300, 106 A.2d 233 (1954).....13,14,15
Liljeberg v Health Services Acquisition Corp., 108 S.Ct. 2194, 486 U.S. 847, 100 L.Ed.2d 855 (1988).22
Litekey v United States, 510 US __, 127 L.Ed 2d 474, 114 S.Ct. 1147 (1994).....23
Marvel v Dannemann, 490 F.Supp. 170 (1980).....15
McGrath v Rhode Island Retirement Board, 906

F.Supp. 749 (R.I.1995) aff'd, 88 F.3d 12 (1st Cir. 1996).....20

Potashnick v Port City Const. Co., C.A.5th, 1980, 609 F.2d 1101, cert denied 101 S.Ct 78, 449 U.S. 820, 66 L.Ed 2d.....22

Seitz v Probate Judges Retirement System, 189 Mich App 445 (Mich App 1991) lv app denied 439 Mich 946 (1992).....18,19

United States v Hatter, 64 Fed.3d 647 (Fed.Cir.1995), lv app. denied 1996.....20

Withrow v Larkin, 421 U.S. 35, 43 L.Ed2d 712, 95 S.Ct 1456 (1974).....26,28

CONSTITUTIONAL PROVISIONS

United States Constitution, Art I, Section 10.....5

United States Constitution, Amendment V.....6

United States Constitution, Amendment XIV Section 1.....5,6,12

Michigan Constitution of 1963, Art. 1 Section 2.....5

Michigan Constitution of 1963, Art. 1 Section 10.....5

Michigan Constitution of 1963, Article 9 Section 24...6

STATUTES

MCL 8.5, MSA 2.216.....5

MCL 38.901 et. seq., MSA 27.3178(60.1).....2,18,19

MCL 38.916, MSA 27.3178(60.16).....5

MCL 38.2101 et seq, MSA 27.125(101) et seq.....25

MCL 38.2305, MSA 27.125(305).....9

MCL 38.2503.....8

MCL 38.2604, MSA 27.125(604).....24, 25

8 U.S.C.A. Section 445.....6

OTHER AUTHORITIES

House Legislative Analysis Section, Sept. 23, 1976.....8

NO. _____

In The Supreme Court of The United States

GEORGE E. BENKO, Petitioner,

v.

JUDGES' RETIREMENT SYSTEM; JAMES NEUBECKER; GORDON LINDSAY; LYLE VAN HOUTEN; and MILTON FIRESTONE, Respondents.

Petition for A Writ of Certiorari

George E. Benko, the petitioner, herein respectfully requests that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals and therein the judgement of the U.S. District Court Eastern District, entered in the above-entitled case on April 15, 1998.

OPINION BELOW

The April 15, 1998, decision of the Sixth Circuit

Court of Appeals, whose judgment herein is sought to be reviewed, was Case No. 97-1241, decided on April 15, 1998, and is unreported, and is reprinted in the separate Appendix to this Petition, **App. A.** The prior opinion of the U.S. District Court Eastern District Southern Division, decided on January 24, 1997, was Case No. 95-40467 and is unreported and reprinted in the separate Appendix to this Petition, **App. B.**

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on April 15, 1998. The jurisdiction of this Court is involved pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Judge's Benefit Clause of the Judges Retirement System, Mich. Comp. Laws Ann. § 38.916(1); Mich. Stat. Ann. § 27.3178(60.16)(1) provides in pertinent part as follows:

Upon a member's retirement from service

as provided in this act, the member shall receive a retirement annuity equal to 3% of the final salary multiplied by the number of years and fraction of a year for service credited to the member's account, except that a member who makes the election described in subdivision (d) shall receive an annuity equal to 3.5% of the final salary multiplied by the number of years and fraction of a year for service credited to the member's account or as otherwise provided in subdivision (d). The annuity shall:

a. Not be less than $4,000.00 per annum if the member has 12 years of service credit.

b. Not exceed $15,000.00 per annum or 40% of the final salary of the member, whichever is greater.

c. When added to a county pension benefit payable under section 12a of Act No. 156 of the Public Acts of 1851, as amended,

being section 46.12a of the Michigan Compiled Laws, not exceed 66 2/3% of final salary.

2. Michigan Law provides for Severance of a portion of a statute:

"In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest instent of the lgeislature, that is to say:

If any portion of an action or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining protions of the applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be

severable." Mich. Comp. Laws 8.5, Mich. Stat. Ann. 2.216

3. Equal Protection is guaranteed by the United States and Michigan constitutions,

". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1

"No person shall be denied the equal protection of the laws. . . " Mich. Const. of 1963, art. I, § 2

4. Contracts are protected from impairment by the Michigan and United States Constitutions,

". . . no state shall. . . pass any Law impairing the Obligation of Contracts." U. S. Const., art. I, § 10.

"No bill of attainder, ex post facto law or law impairing the obligations of contract shall be enacted" Mich. Const. of 1963, art. I, § 10.

"The accrued financial benefits of each pension plan and retirement system of the state and its political

subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." Mich. Const. of 1963, art. 9, § 24.

5. Property may not be taken without just compensation, ". . . nor shall private property be taken for public use without just compensation." U. S. Const., amend. V. ". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . ." U. S. Const., amend. XIV.

6. The United States Code Annotated, Title 28, section 455, entitled "Disqualification of justice, judge, or magistrate", provides in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b)(5)(iii)He shall also disqualify himself in the following circumstances: He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;"

STATEMENT OF THE CASE

Petitioner George Benko was appointed Probate Judge of Sanilac County on April 6, 1963. Petitioner served continuously as probate judge for 31 years 8 months and 24 days until his retirement date of December 31, 1994. He was the longest serving Michigan probate judge.

On May 2, 1963, Petitioner entered into two contracts for retirement benefits; one with Sanilac County (county) and one with the Probate Judges Retirement System (state). The state and county retirement systems are separate and independently established under separate statutes. The benefits under the two contracts were separate and not intertwined.

Petitioner chose to dedicate his career to the bench in part because of the retirement benefits; retired probate judges were received 100% of their final salaries if they joined both plans, approximately 40% from the state plan and 60% from the county plan.

The Michigan legislature amended the state benefit every few years to a numerical amount which

was approximately 40% of the final salary.

In 1976, Petitioner had served 13 years and had vested in both plans. The state benefit was $12,500, which was 40% of the 1976 salary. In 1976, the Legislature amended the act to provide for $15,000 or 40% but when combined with a county plan was not to exceed 2/3's of final salary. This was the first time the legislature addressed both plans within one provision.

The legislative history of the proposed 1976 act states it was to attract personnel of high caliber to seek and occupy the probate judges positions and to upgrade probate judges benefits to match the benefits provided to other judges.

In 1994 when Petitioner retired, the Respondents applied the 1992 (MCL 38.2503(2)(d)) amended statute to Petitioner which provided for $15,000 or 40% of final salary whichever is greater but when added to a county benefit cannot exceed 66 2/3's of final salary. The application of the 1992 statute to Petitioner resulted in a state benefit of $5,609.00. The state decided to apply the repealed 1975 statute and give Petitioner a $12,500

benefit, the benefit he would have received in 1974 had he retired before the amendment.

Presently, no other probate judge receives less from the amended act. Petitioner, who served 13 years before 1976, now receives less benefits from the state than all other probate judges hired after 1976 who did not contribute and serve an additional 13 years.

In 1978, the Petitioner was vested at $15,018 which was 40% of his 1978 salary.

The state pension is presently vested at 125% and it is undisputed that sufficient funds are available to pay the 40% pension. Petitioner and Sanilac County contributed $430,000-$460,000 including interest to the state pension during his employment.

The net result of the 1992 amendment was to reduce his expected retirement compensation from the Judges' Retirement System from a 40% benefit of $3,278.10/month to $1,041.66/month.

Petitioner requested an administrative hearing before the Judges' Retirement Board. The wrongfully withheld contributions in excess of 24 years were

returned but the request for a 40% state benefit that other retired judges were receiving without any reduction by his county pension was denied. Petitioner sought the application of the existing formula without the two-thirds cap; consistent with the legislative history and the Michigan severance statute.

Petitioner filed suit in Federal District Court. Respondent's Motion to Dismiss Judges Retirement System was granted and Respondent's Motion for Summary Judgment was granted.

Petitioner appealed to the Sixth Circuit Court of Appeals which affirmed the lower court.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS RENDERED A DECISION THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND DEPARTED FROM THE

LOWER COURTS WHICH REQUIRE AN EXERCISE OF THIS COURT'S POWER OF JURISDICTION.

The issue in this case is whether the Michigan legislature may constitutionally amend a retirement statute (in 1976 and 1992) to impose new restrictions on a retirement contract which were added after a probate judge had his retirement vested. The impact of the act is to diminish a sitting judges retirement benefits and to offset the responsibility of the Judges Retirement System by any amounts the judge receives from a county benefit.

The District and Circuit Courts failed to address the case of **Gardner v County of Itasca**, 157 N.W.2d 753 (Sp. Ct. Minn. 1968), a Minnesota Supreme Court case which is on all fours with Petitioner's case. In **Gardner**, as in the instance case, the judge was vested in two retirement plans. Prior to retirement the Legislature adopted an amendment which reduced the probate judges retirement pension by the full amount of any retirement pension which occurred in Petitioner's case. The

Gardner court reversed the lower court's finding of summary judgment, concluding that, "The fact remains that after making substantial contributions to the P.E.R.A. from his personal rsources for some 24 years, Judge Gardner suddenly found himself in the same position as those who chose not to contribute to P.E.R.A. He thereby suffered a severe and unexpected economic loss not experienced by colleagues who over the years did not make such provisions for retirement. Viewed in any light the results are so unjust as to compel a holding that Judge Gardner has been denied the equal protection of the laws under U.S. Const. amend. XIV § 1, and Minn. Const. art. 1, § 2 and art. 4 § 33. **Gardner** at 755.

Similarly, Petitioner served 31 years (Gardner served 26 years), both Gardner and Petitioner contributed in excess of 24 years to two independent retirement plans, the application of the amendment to Petitioner, like Gardner, is to receive less than those judges who did not contribute to two pensions, thereby suffering a severe economic impact, by viture of no return on his contributions, which others are not experiencing.

In response to the Court of Appeals questioning the Respondent acknowledged that there were Michigan Probate Judges in similar circumstances as the Petitioner (who joined before 1976 and retired with both a county and state retirement pension) who received 100% of their salary. Petitioner is receiving less benefits from the Respondent than new hires who did not contribute to a county pension, he is entitled to the 100% other judges have received. Respondent before the Court of Appeals was unable to distinguish **Gardner** from the Petitioner's case.

In the landmark case of **Hickey v. Pittsburgh Pension Board**, 378 PA 300, 106 A.2d 233, (1954) the Pennyslvania Supreme Court found an impairment of contract existed where the legislature amended a public pension statute after the plaintiff had vested with years of service and contributions, holding, "But the pension of today is not a grant of the Republic nor in this case is it a gift of the City Fathers. It is the product of mutual promises between the pensioning authority and the

pensioner; it is the result of contributions into a fund which exists for the single purpose of pensions." **Id.** at 434. The court went on to say, "The basic theory which supports retirement statutes is that retirement pay is adjusted or delayed compensation for service rendered in the past." **Id.** at 434.

In discussing a government pension, the court said: "If this contract had been entered into between a private individual and a private corporation it is a fundamental question that the Legislature could not impose an additional condition for its fulfillment. The law does not change because one of the parties is a governmental agency. **Id.** at 434.

In the instance case, as in **Hickey**, it is not acceptable for the legislature to diminish the retirement benefits after vesting. "...Whether it be in the field of sports or in the halls of the legislature it isn't consonant with American traditions of fairness and justice to change the ground rules in the middle of the game." **Id.** at 435.

The **Hickey** court looks at the legislative history

and notes, "Nor is there any indication anywhere that the Legislature to hamstring Thomas Hickey in this fashion . . .the history of retirement and pension legislation shows that the General Assembly of Pennsylvania has displayed an ever-augmenting appreciation of probems which confront long-term public employees, and has made provision for unusual situations so that no government employee will be deprived of what he has the right to expect: economic recognition in the evening of his life when he has given with full will of his energies in the morning and afternoon." **Id.** at 435.

The District Court Judge and the Court of Appeals failed to address the case of **Marvel v. Dannemann**, 490 F.Supp. 170 (D.C. Del. 1980). This case is similar to the case before this court where the legislature attempted to change the terms of a retirement contact after a retirement contract had been entered into by a judge. The United States Federal Court for the District of Delaware holding that there was impairment of contract held, "State judiciary pension plan can create

contract rights which are subject to the protection of the Contract Clause." That court also held that the performance of age and service requirements created a "binding, irrevocable contract which could not be unilaterally altered by the offeror (legislature). The fact that a judge elects to continue to serve in the state judiciary "should not result in significant detriment to him, particularly in the light of the purpose of public pension plans of encouraging persons to enter and remain in public service." "If there has once been unequivocal acceptance, the contract is complete and its binding force cannot be affected by subsequent communications unless they amount to a mutual agreement to rescind or abandon the contract. 1 Williston on Contracts section 72 (3d ed. 1957).

In the case of **Halpin v. Nebraska State Patrolmen's Retirement System**, 320 N.W.2d 910 (Neb. 1982), the Supreme Court of Nebraska, held that a 10-year expectation by patrolmen based upon the past practice of a retirement board created a contract. ". . .

public pensions as deferred compensation, earned in exchange for services rendered, caused courts to simultanously recognize that this created in the employees reasonable expectations entitled to legal protection." **Id.** at 914.

In **Campbell v Judges Retirement System**, 378 Mich. 169 (Mich. 1966), the Michigan legislature amended the retirement act to change the retirement provision from one-half sitting judges salary to one-half final salary. The Michigan Supreme Court issued a writ of mandamus on behalf of the judges holding, ". . . a valid contract was entered into between judges and the state, and the State's agreement thereunder to pay the judges certain benefits created vested rights for the judges upon their retirement, that these are enforceable and cannot be impaired or diminished by the State. This should be deemed to include not only the benefits provided by statute at the time of entry into the contract and of retirement, but, also, those later added by statutory amendment. The legislature may add to but not

diminish benefits without running afoul of the constitutional prohibition against impairment of the obligation of a contract. **Id.** at 181-82.

In **Seitz v. Judges Retirement System**, 189 Mich App 445 (Mich. Ct. App. 1991) lv app denied 439 Mich 946 (1992) a Michigan Court of Appeals case addressing the statute at issue here, the court found that no contract rights were impaired by judges who received more under the 1976 amendment. The court did hold that an unconstitutional impairment of contract would exist if ". . . the state pension benefit to which a probate judge would be entitled under section 16(1)(c) as it currently exists is less than the state retirement benefit to which the probate judge would have been entitled to under the provisions of section 16 prior to the 1976 16(1)(c) would be unconstitutional as applied to that particular judge under the provisions of art 9, section 24." Seitz at 451. Petitioner did receive less under the 1992 amendments when he retired in 1994 ($5,609) than what he would have received if he retired in 1975 ($12,500); however,

he reached $15,018.00 in vested benefits in 1978. The solution in Seitz at 451 is that subsection 16(1)(c) only, which is the 66 2/3's section, would be unconstitutional to a probate judge such as the Petitioner. If only one section is found unconstitutional it may be severed under the Michigan severance statute even as to one person. The district court, respondent and court of appeals all agree that the 1976 amended statute applied to Petitioner is unconstitutional. After concluding that the statute would be unconstitutional applied to Petitioner instead of severing the offending language per the Michigan severance statute all apply a repealed statute. They uphold an unconstitutional statute at all costs even when it works an injustice and even when there is a constitutional solution whereby the offending language could be severed for this Petitioner and the statute could be upheld as to all future hires who did not serve 13 years before their contract was unilaterally impaired by the Michigan legislature. The proper remedy is only to sever the offending portions of the subsection of the act. **Caterpillar, Inc. v Department of Treasury**, 188 Mich.

App. 621 (Mich. Ct. App. 1991)

In the case of **United States v. Hatter**, 64 F.3d 647 (Fed Cir. 1995) the court held that compensation extends beyond mere salary and includes all forms of remuneration attached to the judicial office (**Id.** at 652). Further, to reduce the compensation of sitting federal judges after appointment is a "taking" of property in violation of the fifth amendment. In **Evans v. Gore**, 253 U.S. 245 (1920) and quoted in **Hatter**, the Court held, "The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another. . . the independence of judges as a far greater importance than any revenue that could come from taxing their salaries.

Contract rights are as much private property under the takings clause as they are under the due process clause. **McGrath v. Rhode Island Retirement Board**, 906 F. Supp. 749, 769 (D.R.I. 1995), aff'd., 88 F.3d 12 (1st Cir. 1996) In **Concrete Pipe v Construction**

Laborers Pension Trust, 508 U.S. --, 124 L.Ed2d 539, 113 S.Ct 2264 (1993) the three factors whether a governmental action "takes" private property within the meaning of the taking clause of the Federal Constitution's Fifth Amendment are stated: (1) the nature of the governmental action; (2) the severity of the economic impact and, (3) the degree of interference with the property owners reasonable investment backed expectations. The elements are met where the Petitioner served in excess of 31 years, made mandatory individual and county contributions to the state, knew other judges who were receiving a 40% state benefit.

The trial court failed to disclose his relationship to Preeti Gadola, a daughter-in-law who was employed by the Attorney General's office during the time this matter has been contested and his brother, is a probate judge. Under 28 USCA 455(a), the trial court judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Appellant made allegations of wrongdoing against the Attorney

General's office in his Complaint. In **Liljeberg v Health Services Acquisition Corp.**, 108 S.Ct. 2194, 2202, 486 U.S. 847, 859, 100 L.Ed.2d 855 (1988), the Court held that promotion of public confidence in the integrity of the judicial process, which is the purpose of sec 455(a), "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety so long as the public might reasonably believe that he or she knew." 108 S. Ct. At 2202, 486 U.S. at 860. A judge cannot accept a waiver of disqualification on sec 455(b)(5)(iii) grounds when a relative of the judge has an interest that could be affected by the outcome of the proceeding. **Potashnick v Port City Const. Co.**, C.A.5th, 1980, 609 F.2d 1101, certiorari denied 101 S.Ct. 78, 449 U.S. 820, 66 L.Ed.2d 22.

The trial court's brother "could" have been affected by the outcome of the proceeding. In this proceeding Petitioner requested severance of part of the act. The court in its opinion, discusses that if it found the statute unconstitutional, the entire act would be stricken, not part of the act. If the entire act was stricken

or a portion of the act, and his brother comes under this act, then he would be affected by the outcome of the litigation in the determination of his benefits. Additionally, any award ordered would be paid out of the same source of funds from which the brother will receive his pension benefits.

It is the duty and obligation of the judge to disqualify himself, not the duty of a party to file an affidavit. **Liteky v Bourgeois**, 510 US--, 127 L.Ed.2d 474, 114 S.Ct.1147(1994) Therefore, the trial court erred in not recusing itself where a relative of the judge had an interest that could have been affected by the outcome of the lawsuit.

The primary eleventh amendment issue is who would be responsible to pay any judgment. It is not the State of Michigan, it is the JRS which is funded at 125%. The focus is on the payment of a judgment to the Petitioner solely, not any other potential or unknown claims. The Retirement Board members all stated in their depositions that the funds are for the judges

retirement. In **Almond v Boyles**, 612 F.Supp.223, 228 (D.C.N.C. 1985), the court explains that an award of monetary relief would not infringe upon the state funds, "First , a substantial portion of the money held by the Retirement System was not appropriated by the General assembly. . .Second, state funds lose their identify as "general revenue funds" and become earmarked for a particular purpose. . . Third, and most importantly, the defendants have not shown the court that the relief requested by the Appellant would inevitably lead to an additional appropriation of state funds."

Similarly, the Michigan legislature in MSA 27.125(604)(6), MCL 38.2604(6), "Intention of Act. . .", states, "The assets of the retirement system shall be held in trust and invested for the sole purpose of meeting the legitimate obligations of the retirement system and shall not be used for any other purpose. The assets shall not be used for or diverted to a purpose other than for the exclusive benefit of the members, vested former members, retirants, and retirement allowance beneficiaries before satisfaction of all retirement system

liabilities." The fees collected cannot be used for state purposes, only for the retirement system.

In looking at the intention of the 1992 act the statute reads, "This state intends that the retirement system be a qualified pension plan created in trust under section 401 of the internal revenue code and that the trust be an exempt organization under section 501 of the internal revenue code. The department shall administer the retirement system to fulfill this intent." MSA 27.125 (604)(1), MCL 38.2604(1) This indicates a consent by the state retirement system to be sued in federal court to insure compliance with the I.R.C. regulation.

Respondents attempted to reclassify the fees collected for the judges retirement as state funds, however MSA 27.124(104)(3), MCL 38.2104(3), answers that question:, "Court fees means a court filing fee or costs earmarked for the retirement system and collected by the county, clerk of the circuit court. . ." This indicates that the funds are for the "retirement system" and not for the state of Michigan.

A suit is not barred by Eleventh Amendment

immunity where the retirement fund itself would supply the money for the judgment and ". . . the defendants have not shown the court that the relief requested by the plaintiffs would inevitably lead to an additional appropriation of state funds." **Hair v Tennessee Consol. Retirement System**, 790 F.Supp. 1358, 1361 (M.D.Tenn 1992).

The standard of review for procedural due process is a "probability or risk of actual bias or prejudice". **Withrow v Larkin**, 421 U.S. 35, 43 L.Ed 2d 712, 95 S.Ct. 1456 (1975) "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness. **Id**. at 723 [emphasis supplied]

The due process requirement of a fair trial in a fair tribunal applies to administrative agencies which adjudicate as well as to courts. **Withrow v Larkin**, 421 US 35, 43 L.Ed.2d 712, 95 S.Ct.1456 The fundamental constitutional guaranties of due process embody standards of fairness and justice without unreasonable,

arbitrary, capricious laws and procedures. In this case, bias by the attorney generals office and the Judges Retirement Board is shown where they denied the refund of the overpaid contributions arbitrarily to Petitioner but stopped overpaid contributions to another judge, in violation of their own guidelines. A fair hearing was not held where an opinion was issued stating that the parties read the evidence, when in fact they failed to. What is at the heart of due process if not a fair and impartial decision maker. Here, we have decision makers who didn't even review the documents.

Situations where the probability of unfairness is too high to be constitutionally tolerable, ". . . are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." In this case, the attorney general, has a pecuniary interest in the outcome of this case as his pension benefits are distributed by the same JRS and the Petitioner has from the onset questioned and criticized the multiple roles of the attorney general; including legal advisor, legal

advocate, chairman of the board, beneficiary of the retirement.

Additionally, the presumption of honesty and integrity on the part of administrative decision makers is rebutted where, ". . . under a realistic appraisal of psychological tendencies and human weaknesses conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden. . ." **Id** at 724

The administrative process requires the appearance of fairness and the absence of a probability of outside influences on the adjudicator; it does not require proof of actual partiality. **Hammond v. Baldwin**, 866 F.2d 172, 176 (1989).

This case is appropriate for the granting of a writ of certiorari where cases on point from other jurisdictions have not been addressed. This is an important question of the power of the legislature upon the retirement benefits of judges. Petitioner recognizing

his duty to bring this action so that other judges in the future would not have their retirement benefits reduced by the unconstitutional acts of the leglislature both by impairing the retirement contract (after vesting) and controlling the judicial branch by diminishing their compensation and independence. It is imperative that we have a competent and independent judiciary on both the state and federal level.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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Table of Appendix Contents

6TH CIRCUIT FILINGS:

Opinion,
filed 4/15/98 ..... A1-A15

EASTERN DISTRICT OF MICHIGAN FILINGS:

Judgement Entry,
filed 1/24/97 ..... B1-B72

Order Denying Plaintiff's Motion
for Reconsideration
filed 4/23/96 ..... C1-C8

Order Granting in Part Defendant's
Motion for Dismiss
filed 3/18/96 ..... D1-D16

STATE OF MICHIGAN, JUDGE'S RETIREMENT BOARD:

Order,
filed 9/25/95 ..... E1-E3

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case Nº. 97-1241
Filed April 15, 1998

Pages A-1 thru A-15

NOT RECOMMENDED FOR PUBLICATION

No. 97-1241

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE E. BENKO	)ON APPEAL FROM THE
Plaintiff-Appellant,	)UNITED STATES
v.	)DISTRICT COURT FOR
	)THE EASTERN DISTRICT
	)OF MICHIGAN
JUDGES' RETIREMENT SYSTEM; JAMES	)
NEUBECKER; GORDON LINDSAY; LYLE	)
VAN HOUTEN; and MILTON FIRESTONE,	)
Defendants-Appellees.	)

Before: WELLFORD, NELSON, and SILER, Circuit Judges.

SILER, Circuit Judge. Plaintiff, George E. Benko, appeals the dismissal of certain of his claims against the defendants, Judges' Retirement System, James Neubecker, Gordon Lindsay, Lyle Van Houten,

and Milton Firestone (collectively "JRS"), on Eleventh Amendment immunity grounds, as well as the grant of summary judgment in favor of JRS as to all of Benko's remaining claims. As set forth below, we **AFFIRM**.

I.

In 1963, Benko became a probate judge in Sanilac County, Michigan, and he enrolled in the Probate Judges Retirement System, a state agency charged with administering a pension plan funded by contributions of members and probate court filing fees. *See* MICH. COMP. LAWS ANN. SEC 38.901-.916 (repealed) ("Act").1 He also joined a county pension system. Benko contributed to both the state and county plans until he retired in 1994.

From 1963 until 1974, the Michigan state legislature periodically increased the maximum amount

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1The term "Act shall refer to the statute authorizing the state pension system in which Benko participated, as well as any subsequent iteration of that statute or any superseding statute.

any retired probate judge might receive on a yearly basis, with the maximum in 1974 reaching $12,500. In 1976, the Michigan legislature amended the formula contained in the Act to provide "an annuity equal to 3% of the final salary multiplied by the number of years and fraction of a year for service credited to the member's account . . ." MICH. COMP. LAWS ANN. SEC 38.916(1)(superseded by sec 38.2503(2)(d)). This section further provided floors and ceilings to a member's benefits, setting a minimum annuity of $4,000 for any member with at least twelve years of service, and capping benefits at the greater of $15,000 or 40% of the member's salary. *Id.* Any amount by which the combined county and state pensions exceeded this 2/3 cap, the state benefit would reduce on a dollar-for-dollar basis. *Id.*

The state legislature once again amended the Act in 1992, merging the Probate Judges' Retirement System into the Judges' Retirement System. MICH. COMP.LAWS ANN. Sec 38.2101-.2670. However, there were no substantive changes to the floors and ceilings established under the 1976 amendments.

By operation of the above-cited 2/3 limitation, Benko's ultimate state annuity at the time of his retirement at the end of 1994 was $5,609.70. This was the result of the substantial pension he receives from the county fund of which he is a member and by operation of the dollar-for-dollar state pension reduction. This sum fell short of the $12,500 to which he was entitled prior to the 1976 amendments to the Act. However, in recognition of this shortfall, JRS decided to pay Benko the more generous pre-amendment annuity of $12,500.

Nonetheless, in 1995, Benko filed suit in the United States District Court for the Eastern District of Michigan. The complaint named as defendants the Judges' Retirement System and the Board which administers it, Jim Neubecker (Assistant Auditor General for the state of Michigan), Gordon Lindsay (designee of the Michigan state treasurer), Milton Firestone (Assistant Attorney General for the State of Michigan), and Lyle Van Houten (a governor's appointee). He alleged in his complaint various constitutional violations, including impairment of contract rights in violation of Article I, sec

10, Cl. 1 of the United States Constitution and Article I, sec 10 of the Michigan Constitution, violation of Fourteenth Amendment procedural due process and equal protection rights, and "taking" of property without just compensation in violation of the Fifth and Fourteenth Amendments. The complaint also raised three pendent state claims, including breach of fiduciary duty, promissory estoppel, and violation of the Title Object Clause of the Michigan Constitution.

The district court dismissed the individual defendants in their official capacity, finding them immune from suit under the Eleventh Amendment. The court also dismissed without prejudice Benko's pendent state claims and granted summary judgment in JRS's favor as to all remaining claims.

In the course of the proceedings, an issue arose as to the independence of District Judge Paul Gadola. Judge Gadola's brother was a Michigan probate judge much like Benko, but did not become a member of the JRS until after 1976. Further, after the court had entered judgement against Benko, Benko's counsel contacted

Judge Gadola about the judge's daughter-in-law's employment at the Office of the Attorney general, the office that represented JRS. Judge Gadola responded that she worked for that office, but maintained no involvement with the JRS.

II.

Benko first argues that different pension plans within the JRS give different treatment to the members of those plans, thus violating the Equal Protection Clause of the Fourteenth Amendment. In equal protection cases not involving a "suspect classification," a "fundamental right," or a classification based on gender or illegitimacy, courts apply a "rational basis" test. *Terre v. Boraas*, 416 U.S. 1 (1974). Under this test, a court will uphold a statute if there is any reasonable conceivable state of facts to support it. *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Benko's challenge falls on rational basis grounds. His claim revolves exclusively around the notion that he alone receives unfair treatment under the Act. As the

Supreme Court held in *Dandridge v. Williams*, 397 U.S. 471 (1970), a court will not hold a statute unconstitutional on Equal Protection grounds simply because it results in incidental inequity. The district court's finding that the legislature made a rational connection between means and ends in trying to effect the legitimate goal of fair but not exorbitant compensation for state judges should therefore stand.

Benko then contends that the 1976 amendments to the Michigan Probate Judges Retirement Act, MICH. COMP. LAWS ANN. Sec 38.2503(2)(d), operate to impair a contractual right he enjoyed under the pre-amendment Act. He makes two separate arguments in this regard. First, he claims that the 1976 amendments diminish a pension benefit in which he had a vested right. Second, he argues that the proper remedy for this injury is not to deem the amendments inapplicable to him, but rather to apply the 1976 amendment without the portions which he finds offensive to his rights. Thus, by his formula, Benko would receive his full county pension, plus 40% of his final salary and without the 2/3

overall limitation currently provided under the statute.

Although Benko may be correct that the 1976 amendments are unconstitutional as applied to him, he currently receives the full $12,500 in which he had a vested right prior to the 1976 amendments. The Board determined that because the 1976 amendments operated to reduce Benko's benefits, it would give him the highest amount he could have received pre-amendment irrespective of any 2/3 cap.

Moreover, the district court did not err in determining that the JRS had selected the appropriate remedy, and that Benko therefore had suffered no injury. Michigan case law strongly suggests that in this circumstance, the proper relief for an aggrieved party is to apply the pre-amendment law. *See Seitz v. Probate Judges' Retirement System*, 474 N.W.2d 125, 128-29 (Mich. App. 1991) (advising that judges who receive less pension benefits as a result of the 1976 amendments should receive the more generous $12,500 pre-1976 maximum). Thus, Benko, does not suffer any impairment of contact, since he already receives the

$12,500 in which he had a vested right pre-amendment, and since he is not entitled to anything more through a severance of the 2/3 cap contained in the amended Act.

Benko further argues that he has been deprived of property without just compensation in violation of the Fifth and Fourteenth Amendments. In this connection, he first posits that he suffered a taking in an amount equal to difference between the $5,609.70 which he would receive were the JRS to apply the 1976 formula to him, and the alternative $39,537.20 (40% of his final salary) he believes is his entitlement once the court severs the 2/3 limitation. Second, Benko argues that the mandatory contributions he made from 1976 through 1994 were "taken" because he received no corresponding increase in benefits from those contributions.

Both arguments are meritless. First, it would be improper to read the 2/3 cap out of the 1976 amendments. Rather, Benko is only entitled to the monies in which he had a vested interest prior to 1976, *i.e.*, the $12,500 he already receives. There is therefore no taking in this regard. Second as Benko acknowledges

in his brief, he was required to make contributions into the JRS for up to twenty-four years, so long as he remained on the probate bench. He further concedes that the JRS returned all mandatory contributions Benko made after those twenty-four years. Because Benko's vested right in the $12,500 was explicitly conditioned upon continued contributions to the pension fund for up to twenty-four years, and because the extent of his "property" right is the extent of his vested contractual right, Benko is hard-pressed to establish a property right in anything beyond the $12,500.

Next, Benko assigns as error the district court's grant of summary judgment as to his allegation that the JRS violated his procedural due process rights. Benko offers three arguments on this score. First he contends that the fact that the office of the state Attorney General improperly maintained a dual role in the administrative process as both adjudicator and as partisan representative. Second, he argues that because Michigan's Attorney General, Frank Kelley, participates in the JRS, he has an impermissible pecuniary interest in

the resolution of Benko's claim, and therefore should have been excluded from the adjudication process. Finally, Benko contends that the JRS did not follow Michigan law, thus violating procedural due process.

Each of these arguments fails. First, a single government agency can play the role of both decision-maker and partisan so long as there is no showing of a "risk of actual bias or prejudgment." *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1974). Here, Benko has not shown that there is any such risk. Moreover, there is no showing that any one individual within the Office of the Attorney General performed more than one function. Rather, Milton Firestone, acting as the delegate of the Attorney General, sat as a member of the decision-making body, while others acted as legal representative for the JRS opposing Benko. His first due process argument therefore fails. Second, the Attorney General has removed himself from the process, having delegated his responsibility for administering the JRS to an Assistant Attorney General with no similar financial interest. This is sufficient to avoid any appearance of

impropriety. Third, Benko's claim that the JRS did not follow Michigan law is incorrect. Benko alleges that the decision-making Board was improperly convened because only four members, rather than the full five, participated in Benko's case. He cites MICH. COMP. LAWS ANN. Sec 38.2202, which governs replacements of retiring Board members, for the proposition that every out-going Board member must hold office until the governor appoints a replacement. However, MICH. COMP. LAWS ANN. Sec 38.2203(2) permits the Board to act with only three members participating. Benko's reasoning is therefore faulty.

Benko then contends that because Judge Gadola's brother is a probate judge in Michigan who might have his retirement plan through the JRS, and because Judge Gadola's daughter-in-law worked for the office of the Attorney General at times during the pendency of Benko's case, Judge Gadola should have recused himself to avoid any appearance of bias. However, Benko has not shown that either relative might "be substantially affected by the outcome of the proceeding" within the

meaning of 28 U.S.C. sec 455(b)(5)(iii). First, the facts presented and the possible remedies available are only relevant to Benko's individual case and very likely would have no effect whatsoever on other participants in the JRS. Benko's counsel in fact acknowledged as much when Judge Gadola raised the issue in open court. Indeed, to the extent Benko theorizes a possible effect on Judge Gadola's brother, that effect suggests that there would be a bias in favor of Benko, since Judge Gadola's brother, as a probate judge, would have the same interest Benko has in prosecuting certain of the constitutional claims. Benko thus has no basis on which to complain. Likewise, there is no showing that Judge Gadola's daughter-in-law, as an employee of the Office of Attorney General, had any involvement in Benko's case, much less in any matter relevant to the JRS. There is therefore no evidence of any possible effect on her interests. Judge Gadola thus did not abuse his discretion in failing to recuse himself.

Benko further challenges the district court's refusal to hear his state claims based on breach of

fiduciary duty, promissory estoppel, and violation of the Title Object Clause of the Michigan state constitution. This court reviews refusals to exercise supplemental jurisdiction for abuse of discretion. *Musson Theatrical, Inc. V. Federal Express Corp.*, 89 F.3d 1244, 1254 (6th Cir. 1996). There was no abuse of discretion here.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JUDGEMENT ENTRY

Sixth Circuit Case Nº. 97-1241
Filed January 24, 1997

Pages B-1 thru B-72

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

GEORGE E. BENKO,

Plaintiff, Civil Action No. 95-40467

v. HONORABLE PAUL V. GADOLA

JUDGES' RETIREMENT SYSTEM,

JAMES NEUBECKER U.S.DISTRICT JUDGE

GORDON LINDSAY,

LYLE VAN HOUTEN AND

MILTON FIRESTONE, jointly and severally,

Defendants.

_____/

JUDGMENT

This action came before the court, Honorable Paul V. Gadola, District Judge, presided, and the issues having been duly reviewed and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing that the action be dismissed on the merits.

It is further ORDERED that the clerk serve a copy of the judgment by United States mail on the counsel for plaintiff and on counsel for defendant.

Dated at Flint, Michigan, this 24th day Jan., 1997.

APPROVED: JOHN P. MAYER

_____ By:_____

PAUL V. GADOLA Deputy Clerk

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

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MILTON FIRESTONE, jointly and severally,

Defendants.

_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On March 19, 1993, plaintiff filed the instant action seeking to increase the pension benefit he receives from the Judges Retirement System from $12,500 to $39,537.20. In his complaint, plaintiff alleges several federal causes of action, such as equal protection, due process and civil rights violations in addition to

impairment of contract and the taking of property without just compensation. Defendants filed a motion for summary judgment on November 12, 1996. For the following reasons, this court will grant defendants' motion for summary judgment and dismiss all plaintiff's claims.

FACTS

Plaintiff was a probate judge in Sanilac County, Michigan from April 8, 1963 until he retired on December 31, 1994. On May 2, 1963, shortly after he became a probate judge, plaintiff enrolled in the Probate Judges Retirement System,1 an agency of the State of Michigan which administers a pension plan for probate judges funded by individual contributions and probate court filing fees. M.C.L. sec 38.901, et. seq. (repealed). At the time the plaintiff joined the Probate

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1 In 1993, the Probate Judges Retirement System was merged into the Judges Retirement System, which also includes other state judges and certain state officials. 1992 P.A. 234, M.C.L. sec 38.2101, et. seq.

Judges Retirement System, the maximum yearly pension available ("state pension") was $6,000, assuming the requisite age and years of service. Periodically, the maximum amount increased, and in 1974, the maximum state pension was $12,500. These maximum allowances were clearly defined in an act entitled the Probate Judges Retirement Act. M.C.L. sec 38.901, et seq. (repealed).

In 1976, the Probate Judges Retirement Act was again amended in the following fashion:

> Section 16. (1) Upon a member's retirement from service as provided in this act, the member shall receive a retirement annuity equal to 3% of the final salary multiplied by the number of years and fraction of a year for service credited to the member's account. . . .The annuity shall:
>
> (a) Not be less than $4,000 per annum if the member has 12 years of service credit.
>
> (b) Not exceed $15,000 per annum or 40% of the final salary of the member,

whichever is greater.

(c When added to a county pension benefit payable under section 12a of Act No 156 of the Public Acts of 1851, as amended, being section 46.12 of the Michigan Compiled Laws, not exceed 66-2/3% of final salary.

Following the 1976 Amendment, the statute was again amended in 1992 when the Probate Judges Retirement Act merged with the Judges Retirement Act into one statute entitled the Judges Retirement Act of 1992. The 1992 amendment was stylistic, as opposed to textual and therefore the substance of the 1976 Amendment, M.C.L. sec 38.916 (repealed) is effectively incorporated, in toto, in section 503 of the Judges Retirement Act of 1992, M.C.L. 38.2503. Specifically, section 503(d) of the Judges Retirement Act of 1992 reads, in relevant part, as follows:

> . . . the retirement allowance is 3% of the member's or vested former member's final compensation multiplied

by the number of years and fraction of a year of credited service. A retirant shall not receive a retirement allowance under this subdivision that exceeds $15,000 or 40% of his or her final compensation, whichever is greater. A retirant shall not receive a retirement allowance under this subdivision that when added to a retirement benefit payable under a county pension retirement plan exceeds 66-2/3% of his or her final compensation.2

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2 Henceforth, this court will interchangeably use term 1976 amendment and section 503 of the Judges Retirement Act of 1992 to describe the substantive changes that were made to the Probate Judges Retirement Act in 1976. Thus, any reference made by this court to "section 503 of the Judges Retirement Act of 1992," M.C.L. § 38.2503 should be considered synonymous with the term "1976 amendment," M.C.L. § 38.916(repealed) and vice versa.

Under section 503(d) of the Judge's Retirement Act of 1992, plaintiff's retirement allowance computes to an estimated $5,600. This is due to the fact that plaintiff's county pension is of such great magnitude (approximately $60,000) that if the petitioner were to receive a state retirement allowance of 40% of his final salary (approximately $39,000), it would push him over the limitation contained in section 503 of the Judges Retirement Act of 1992 that no retirant shall "receive a retirement allowance under this section that when added to a retirement benefit payable under a county retirement plan exceeds 66 2-3% of his or her final compensation." M.C.L. sec 38.2503(d).

The plaintiff's annuity under the Judges Retirement Act of 1992 ($5,600) is less than it would have been 20 years ago, prior to passage of the amendment in 1976 when the plaintiff's annuity calculated to $12,500. Recognizing that plaintiff had a "vested" contractual right to receive a retirement benefit of $12,500 in 1976 and not wanting to impair that right, the Judges Retirement System actually gives plaintiff a

benefit of $12,500. See e.g. Seitz v. Probate Judges Retirement Board, 189 Mich. App. 445, 451-52 (Mich. App. 1991) ("[I]f the state pension benefit to which a probate judge would be entitled under [the Judges Retirement Act of 1992] would be unconstitutional as applied to the particular judge under the provisions of art. 9, sec 24 [of the Constitution of the State of Michigan]. . . with respect to those judges of probate before the effective date of the 1976 act, those judges are, at a minimum, entitled to the state pension benefit which would have been paid before the 1976 amendment, namely three percent of the final salary times years of service, to a maximum of $12,500.")

It is the plaintiff's belief that he has a "vested right" to receive a benefit greater than the $12,500 he currently receives. To protect his pension, plaintiff sought and received a hearing before the Judges Retirement Board ("JRB"), a body created by the Judges Retirement Act, on February 22 and March 8, 1995. At the hearing before the JRB, plaintiff's initial argument was that he was entitled to a sate pension equal to 100%

of his final salary because he had been told by three retired probate judges who had served in excess of thirty years that they were receiving 100% of their salaries. In the alternative, plaintiff claimed that the Judges Retirement Act of 1992 was unconstitutional, only insofar as it limited his combined state and county pension to 2/3 of his final salary. In regard to the remainder of the statute (e.g. providing each retirant a pension of $15,000 or 40% of his final average compensation, whichever is greater), plaintiff argued that it could be severed and applied to him without running afoul of the Constitutions of the United States and State of Michigan. Moreover, he sought a refund, with interest, of the amount of contributions he allegedly overpaid the system.3 The JRB rejected all of plaintiff's

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3 Prior to the 1976 Amendment, the Probate Judges Retirement Act provided that no member was required to contribute for more than 24 years. Plaintiff contributed to the system for approximately 31 years and thus sought a return of monies paid for approximately 7 years.

claims, except for his claim for excess contributions. No appeal to the JRB was taken.

Instead, plaintiff filed the instant suit against the Judicial Retirement System and the four members of the JRB: James Neubecker, Deputy Auditor General; Gordon Lindsay, who sits on the Board as the designee of the State Treasurer; Milton Firestone, who sits on the Board as the designee of the Attorney General; and Lyle Van Houten. On March 18, 1996, this court dismissed all plaintiff's claims against the Judicial Retirement System, all plaintiff's state claims, and all plaintiff's federal claims insofar as they sought retrospective relief. After dismissing the aforementioned claims only four claims remained: impairment of contract; denial of due process; violation of the Takings Clause; violation of 42 U.S.C. sec 1981, 1983, and denial of equal protection. On November 12, 1996, the defendants filed a motion for summary judgment as to all plaintiff's remaining claims.

ANALYSIS

1. Standard of Review

Federal Rule of Civil Procedure 56© empowers

the court to render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." Fed. R. Civ. P. 56 (c). There is no genuine issue of material fact when the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." In re Dollar Corp., 25 F.3d 1320, 1323 (6th Cir. 1994) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). "The mere existence of some alleged factual dispute between the parties will not defeat the otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48. In deciding a motion for summary judgment, the

court must consider all evidence together with all inferences to be drawn therefrom "in light most favorable to the party opposing the motion." Watkins v. Northwestern Ohio Tractor Pullers Ass'n, Inc., 630 F.2d 1155, 1158 (6th Cir. 1980).

If the movant meets the standard specified at Rule 56(c), then the opposing party must come forth with "specific facts showing that there is a genuine issue for trial." First National Bank v. Cities Serv. Co., 391 U.S. 253, 270 (1968); Fed. R. Civ. P. 56(e). The non-moving party "Is not entitled to a trial merely on the basis of allegations; significant probative evidence must be presented to support the complaint." Kraft v. United States, 991 F. 2d 292, 296 (6th Cir. 1993), cert. denied, 114 S.Ct. 467 (1993); Gregg v. Allen Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986). And, "if the adverse party does not respond, summary judgment, if appropriate shall be entered against the adverse party." Fed. R. Civ. P. 56(e); Rizzo v. Goode, 423 U.S. 362, 370-71 (1976); O'Hara v. Wiggington, 24 F.3d 823, 826-27 (6th Cir. 1994).

2. Whether Plaintiff Was Deprived Procedural Due Process

County IV of plaintiff's complaint alleges that he was denied procedural due process at the hearing before the JRB in contravention of the Fourteenth Amendment to the United States Constitution. First, plaintiff asserts that the Michigan Attorney General improperly served as both "prosecutor" and "adjudicator" in plaintiff's hearing before the JRB. Second, plaintiff alleges that the Attorney General should not have played any adjudicatory role due to his alleged pecuniary interest in the outcome of plaintiff's hearing. Third, plaintiff contends that the hearing was not fair and impartial because members of the JRB allegedly failed to follow Michigan statutes in deciding plaintiff's case. Defendants assert that there is no genuine issue of material fact which would preclude entering summary judgment in favor of defendants on this claim.

A. Whether There Was An Improper Conflict of interest Where One Assistant Attorney General Served as "Prosecutor" and Another Assistant

Attorney General Served as "Adjudicator"

First, plaintiff alleges that there is a genuine issue of material fact as to whether his hearing before the JRB was tainted by an alleged conflict of interest, to wit: the Attorney General's dual role of "prosecutor" and "adjudicator" at said hearing. Defendant maintains that there is no factual or legal support for this claim.

To understand the nature of plaintiff's argument, an explanation is warranted concerning the Attorney General's dual roles as "prosecutor" and "adjudicator" to the Judges Retirement System. First, Michigan Compiled Law section 38.2202 appoints the Attorney General, along with the State Treasurer, Deputy Legislative Auditor General and the two members appointed with the advice and consent of the Senate, to the JRB to serve as "adjudicators." In order to fulfill this role under M.C.L. sec 38.2202, the Attorney General has designated an Assistant Attorney General, Milton I. Firestone, to serve on the JRB. 4 Second, in addition to

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4 Section 39.202 of the Michigan Compiled Laws

serving as an "adjudicator" on the JRB, the Michigan Legislature also commands the Attorney General to furnish legal advice and representation to the staff of the Judges Retirement System, or in other words to play "prosecutor" for the Judges Retirement System. See M.C.L. sec 38.2207. Assistant Attorney General Walter Kron fulfills the Attorney General's role as legal counselor to the Judges Retirement System. Ergo, the Legislature has defined two unique roles for the Attorney General under the Judges Retirement Act of 1992- "adjudicator" for the JRB and "prosecutor" for the Judges Retirement System. Plaintiff claims that this mixing of functions violated his due process rights at the hearing before the JRB.

The Supreme Court explained the standard of review for procedural due process cases involving allegations of bias in the adjudicatory setting in Winthrow v. Larkin, 421 U.S. 35, 46-47 (1974) (citations omitted) (emphasis added):

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cloaks the Attorney General with this authority.

Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decision-maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

The contention that the combination of investigative and adjudicative functions

> necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

See also Porter County Chapter of the Izaak Walton League of America, Inc., et al. v. Nuclear Regulatory Comm'n., 606 F.2d 1363, 1371 (D.C. 1979) ("Even as to adjudications, with combination in one administrative body of adjudicative with other functions violates constitutional guarantees only when the combination 'poses such a risk of actual bias or prejudgment that the

practice must be forbidden if the guarantee of due process is to be adequately implemented.'") (citation omitted).

Given the demanding burden on plaintiff set out in Winthrow, 421 U.S. 35 (1974), plaintiff's claim must fail. The plaintiff has proffered no evidence showing that there was actual bias due to an improper commingling of roles by the Assistant Attorney Generals involved in the proceedings before the JRB. Rather, plaintiff's claim with respect tot his issue is cobbled together with bold assertions amounting to nothing more than pure conjecture. For Gordon Lindsay, does not have a legal background "and it can be assumed he will vote upon the advise of legal counsel." He also argues that the vote of Assistant Attorney General, Milton Firestone, "apparently" has more weight that the votes of the other members. Furthermore, he contends that the JRB's vote could not possibly have been neutral since at plaintiff's hearing before the JRB: (1) the "prosecutor," Assistant Attorney General Walter Kron, has in the past served as legal adviser to the JRB and (2) Assistant

Attorney General, Mike Moquin, 5 who now provides legal advice to the JRB, was present in the room and sitting next to Walter Kron during plaintiff's hearing. Moreover, plaintiff insinuates that somebody could have rifled through the Attorney General's files since "the files from all cases remain unlocked in the hallway." He also pre-supposes partiality on behalf of the JRB toward the position of the Judges Retirement System given the fact that the Assistant Attorney Generals cahnge positions from time to time, sometimes serving on the JRB as "adjudicator" and other times playing the role of "prosecutor" and still other times serving merely as "legal advisor" (e.g. Walter Kron departing his post as legal advisor to become a legal advocate for JRS). In essence, all plaintiff's claims amount to charges of perceived structural bias, not actual bias. Indeed this court finds no genuine issue of material fact as to whether members of the JOB were actually biased at

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5 There is no evidence that Mike Moquin gave any advice to the JRB concerning plaintiff's case.

plaintiff's hearing and there is not genuine issue of material fact as to whether the Attorney General improperly wore two hats, so to speak, at plaintiff's hearing.

The record is abundantly clear that the JOB was not improperly influenced by any Assistant Attorney General. There is no evidence that the Assistant Attorney General who adjudicated plaintiff's claim, Milton Firestone, was predisposed to side with the Judges Retirement System. Milton Firestone testified that the fact that another Assistant Attorney General, Walter Kron, presented the case did not influence his decision in any way. He stated that:

> many times people representing people appearing before one of the retirement boards, one that's more active, are people who I know very well. And the fact that they're representing one side doesn't sway me one way or the other if it doesn't fit the statute as I interpret the statute.

Furthermore, there is no evidence that Milton

Firestone, or any other Assistant Attorney General advocated the position of the Judges Retirement System to the other three members serving on the JRB. Gordon Lindsay testified at his deposition that he did not speak with any Assistant Attorney General about plaintiff's case other than communicating with "prosecutor" Walter Kron during the hearing. Likewise, James Neubecker and Lyle VanHouten averred that they reached their decisions independently and were not influenced by Miiton Firestone or any other Assistant Attorney general. In short, there is no evidence that JRB members were biased in favor of the Judges Retirement System. Coupling the lack of evidence with the strong presumption of fairness and impartiality that accompanies state administrators in the performance of their duties, plaintiff's procedural due process claim with respect to this issue undeniably must fail.6

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6 Plaintiff asserts two additional claims worth noting. First, plaintiff argues that certain JRB members did not consider all the evidence. For instance, plaintiff

b. Whether the Attorney General Has a Pecuniary Interest

Plaintiff's second procedural due process claim, likewise, alleges an impermissible conflict of interest within the JRB. In particular, plaintiff asserts that the Attorney General had a pecuniary interest in the outcome

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alleges that one member, James Neubecker, did not consider all the evidence. Plaintiff argues that Neubecker did not receive a copy of a red book, which the plaintiff furnished the JRB, and thus Neubecker did not review the documents contained in the red book, such as plaintiff's exceptions to the hearing officer's proposal for a decision. This court finds that the JRB members did consider all the evidence. At his deposition, Neubecker merely testified that he did not remember what he received and "suspected]" that he did not receive the red book. And even though Neubecker speculated that he did not receive a copy of the red book, he may have been supplied with a copy of all the information contained in the red book.

of the plaintiff's proceeding since he was a beneficiary of the Judges Retirement System. See Withrow v. Larkin, 421 U.S. 35, 47 (holding that the fundamental

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Second, plaintiff maintains that the JRB did not understand the issues presented in plaintiff's case. Plaintiff references a portion of Milton Firestone's deposition testimony out of context to prove that the JOB did not understand the legal issues involved in plaintiff's case. In particular, plaintiff cites a part of Firestone's deposition testimony at which he is asked by plaintiff's attorney whether or not he understands why plaintiff is only receiving a $12,500 benefit under the Judges Retirement Act, to which he responds, "I don't know how to apply [the statute] to the fact situation." Yet, upon a deeper probe of the deposition transcript it is apparent that Firestone did not admit that he was unfamiliar with the law at the time the decision was rendered. Rather, he merely acknowledge that he was not in a position to answer the question because he "really [didn't] recall the details."

guarantee of due process is violated when an adjudicator has a pecuniary interest in the outcome).7 This alleged financial interest, plaintiff asserts, should have disqualified him from serving on the JRB. See M.C.L. § 38.2603 ("Except as provided in this act, a retirement board member or employee of the retirement board shall not have any interest, direct or indirect, in the gains or profits of any investments made of the retirement system funds.").

This claim is devoid of factual and legal support. First, plaintiff's allegation is factually deficient. The Attorney General, Frank Kelley, does not sit on the JOB, but instead e has delegated an Assistant Attorney General who is not a member or beneficiary of the Judges

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7 See Contesti v. Attorney General, 164 Mich. App. 271, 281 (1987), lv. app. denied. 430 Mich 893 (1988) (holding that the positions of township trustee and school district superintendent are incompatible where the board of trustees and the school district are in a contractual relationship).

Retirement System, Milton Firestone, to sit in his place. By so doing, the Attorney General has eradicated any possible conflict of interest. Also, the record in barren of any evidence that the Attorney General influences the vote of the Assistant Attorney General who presides on the JRB. Second, there is no legal foundation for plaintiff's claim because, assuming arguendo that the Attorney General himself did sit on the JRB, a decision for the plaintiff would in no way diminish the Attorney General's pension. The terms, conditions and the amount of the Attorney General's pension is guaranteed by statute and the Constitution of the State of Michigan ensures the Attorney General that "[t]he accrued financial benefits of [his] pension plan and retirement system . . . shall not be diminished or impaired." Mich. Const. Of 1963, art. 9, § 24.

c. Whether the Judges Retirement Board Violated Michigan Law

Lastly, plaintiff asserts that the JOB did not follow procedures mandated by Michigan law in arriving at its decision. This claim is meritless, and must be

dismissed. For instance, plaintiff claims that the JOB is "above following the law" because it issued a one page opinion, and did not make findings of fact and law as required by section 24.285 of the Michigan Compiled Laws. Yet, what plaintiff fails to point out is that a Hearing Officer, Elizabeth R. Schwartz, published findings of fact and law on June 13, 1995 and that the JOB simply adopted such findings. See Butcher v. D.N.A., 158 Mich. App. 704, 706 (Mich. App. 1987) (where a hearing officer issued an opinion containing findings of fact and conclusions of law, which were incorporated into the final decision of the DNA). Such findings were in strict accordance with the Michigan Administrative Procedures Act, M.C.L. § 24.285 and Michigan case law, Consumers Power Co. v. Mich. Public Service Comm., 78 Mich. App. 581, 585 (Mich. App. 1977).

Citing section 38.2202 [8] Of the Michigan

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8 Section 38.2202 of the Michigan Compiled Laws reads, in relevant part: (1) . . . The Michigan judges

Compiled Laws, plaintiff additionally claims that the JRB was "improperly convened" because only four, as opposed to five, members of the JRB presided over his case. Plaintiff insists that in order for the JRB to adjudicate a matter, it must have five members and since

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retirement board is created in the department. Except as provided in subsection (3), the retirement board consists of the following 5 retirement board members:

a. The state treasurer.

b The attorney general.

c The deputy legislative auditor general

d. Two members appointed by the governor with the advice and consent of the senate

(2). . . If a vacancy occurs in the office of an appointed retirement board member, the governor, with the advice and consent of the senate, shall appoint a retirement board member for the remainder of the unexpired term. A retirement board member shall continue to hold office after the expiration of his or her term of office until a successor is appointed and is qualified.

one seat was vacant at the time of his hearing, his hearing should have been adjourned until a fifth member was appointed. In so arguing, plaintiff completely disregards section 203 of the Judges Retirement Act of 1992, M.C.L. § 38.2203(2), which permits action by a quorum, defined as a majority of the JRB. Since four of the five members heard and decided plaintiff's matter, a quorum was definitely present and the decision was proper.

Yet one more complaint lodged by the plaintiff under the guise of a procedural due process violation is that plaintiff had to resort to a hearing in order to obtain a refund of the contributions he overpaid into the Judges Retirement System. This does not amount to a procedural due process violation because plaintiff has not defined any "liberty" or "property" interest which has been injured as a result of having to resort to legal channels to obtain redress, as plaintiff must do to succeed on a procedural due process cause of action. See Paul v. Davis, 424 U.S. 698 (1976) (holding that plaintiff had no cognizable claim under the Fourteenth

Amendment Due Process Clause because the suffering of harm to his reputation was not a denial of a constitutionally protected "liberty" or "property" interest). And if plaintiff claims he has been unconstitutionally denied his contributions, such claim is moot because all overpaid contributions have been returned to plaintiff.

2. Whether the Judges Retirement Act of 1992 Violates the Equal Protection Clause

In the seventh count of plaintiff's complaint, he claims that the Judges Retirement Act of 1992 [9] Violates the Equal Protection Clause of the United States Constitution. Plaintiff points to two classifications, in particular, which allegedly violate his equal protection rights. Initially, he contends that the Judges Retirement

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9 Although the plaintiff predicates his equal protection claim on the Judges Retirement Act of 1992, his argument is essentially that the 1976 Amendment violates the Equal Protection Clause.

Act of 1992 irrationally categorizes its members into one of seven plans. His second challenge to the Act is that it disparately treats him because he is the only judge whose state retirement benefits decreased after 1976. 10 After 1976, plaintiff was entitled to $5,600 in in state pension benefits, while prior to 1976 he was entitled to $12,500 regardless of the benefits received under the county pension plan. Plaintiff references the legislative history of the 1976 Amendment, which states that the purpose of such a revision was to "increase judges benefits" to further his argument that the 1976 Amendment is unconstitutional. In making this second equal protection argument, plaintiff attempts to play on the sympathies of this court by asserting that he "was the longest serving Attorney Probate Judge in the State of Michigan" and that other judges with less service to the state are receiving a larger pension. For instance, a judge who

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10 To show this, plaintiff proffers a list containing the names of various probate judges and the amount that each receives under the Judges Retirement Act of 1992.

served only 18 years and paid in only $17,640 allegedly receives $19,127 more per year from the Judges Retirement System than plaintiff.

"A violation of Equal Protection occurs when the government treats someone different 9sic) than others similarly situated." Brennan v. Stewart, 834 F. 2d 1248, 1257 (5th Cir. 1988). An equal protection challenge can only be made to laws which classify individuals. Joyce v. Mavromatis, 783 F.2d 56 (6th Cir. 1986); Crooked Lake Development, Inc. v. Emmet County, 763 F. Supp. 1398 (W.D. Mich. 1991). In other words, the statute must be aimed at an individual as a member of a group, and subject that individual to differential treatment in order to be challenged on equal protection grounds. A statute which applies even-handedly to all does not run afoul of the Equal Protection Clause. New York Transit Authority v. Beazer, 440 U.S. 568, 587 (1979). The Fourteenth Amendment guarantees equal laws, not equal results. Personnel Administrator of Mass. v. Feeny, 442 U.S. 256, 271-72 (1979).

Plaintiff's first equal protection claim is that the

classification scheme delineated in the Judges Retirement Act of 1992 amounts to unconstitutional line-drawing. Specifically, plaintiff posits that probate judges of certain classes within the pension system "are elevated above" members of other classes.11

The Judges Retirement Act of 1992 classifies its members into one of seven categories, or "plans." Only the fourth, sixth and seventh plans apply to probate judges. Section 108 of the Judges Retirement Act of

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11 Also, this argument is faulty because it presupposes that there is only a cap placed upon the benefits given to plan six members, and not plan four and plan seven members. Yet, this is not true because plan four and seven members pensions are limited to 60% and 66 2/3% of the judge's final compensation, respectively. Since plan four members receive lower salaries than plan six and seven members, their ceiling is set at 60%, as opposed to 66 2/3%. At the end of the day, neither plan four nor plan seven members receive a larger total pension than plan six members, such as the plaintiff.

1992 explicitly describes the categories.

(7) "Plan 4 member" means a member of vested former member who is or was a judge of the probate court serving in a single county of less than 15,000 population.

(9) "Plan 6 member" means a member who on the day before the effective date of this act was a member or former vested member of the former probate judges retirement system, who may be a member of a county retirement plan, and who is under the 3% benefit formula provided by section 16(1)(a), (b), (c of the former Act No. 165 of the Public Acts of 1954.

(10) "Plan 7 member" means a member who on the day before the effective date of the act was a member or vested former member of the former judges probate retirement system, who is not a member of a county retirement plan, and who is under

the 3.5% benefit formula provided by section 16(1)(d) of the former Act No. 165 of the Public acts of 1954.

The computation utilized to determine the pension available to a retiring probate judge varies depending on to which plan the judge belongs. Also, each plan sets a distinct ceiling on the level of benefits to which its members are entitled. The formulas and limitations are denoted at section 503 of the Judges Retirement Act of 1992:

> (2)(b). . . For a. . . plan 4 member who has 12 or more years of credited service, the retirement allowance is 50% of the member's or vested former member's final compensation plus 2.5% of the member's or vested former member's final compensation multiplied by the number of years and fraction of a year of credited service in excess of 12 years of credited service but not more than 16 years of credited service. A retirant shall not

receive a retirement allowance under this subdivision that exceeds 60% of his or her final compensation.

For a plan six member, the retirement allowance is 3% of the member's or vested former member's final compensation multiplied by the number of years and fraction of a year of credited service. A retirant shall not receive a retirement allowance under this subdivision that exceeds $15,000 or 40% of his or her final compensation, whichever is greater. A retirant shall not receive a retirement allowance under this subdivision that when added to a retirement benefit payable under a county pension retirement plan exceeds 66-2/3% of his or her final compensation.

(e) For a plan 7 member, the retirement allowance is equal to the amount computed under this subdivision. A

retirant shall not receive a retirement allowance under this subdivision that exceeds 66-2/3% of his or her final compensation. The retirement allowance under this subdivision equals the sum of the following, as applicable:

(I) 3.5% of the member's or vested former member's final compensation multiplied by the years and fraction of a year of service credited before January 1, 1983 for which the member or vested former member makes the 5% payment to the retirement system as provided in section 16(1)(d) of the former Act No. 165 of the Public Acts of 1954, if any.

(ii) 3% of the member's or vested former member's final compensation multiplied by the years and fraction of a year service credited before January 1, 1983 for which the 5% payment described in subdivision (I) is not made, but not to

exceed 40% of the member's or vested former member's final compensation.

(iii) 3/5% of the member's or vested former member's final compensation multiplied by the years and fraction of a year of service credited after December 31, 1982.

Judges Retirement Act of 1992, M.C.L. § 38.2503. Note that a plan four member is not to receive a retirement allowance in excess of 60% of his or her final compensation, plan seven members are limited to a retirement allowance of 66 2/3% of their final compensation, while a plan six member is limited to an amount that, when added to the retirement benefit payable under a county pension plan, does not exceed 66 2/3% of his or her final compensation. Plaintiff is a plan six member.

In reviewing a statute to ascertain whether it violates the Equal Protection Clause, a court applies one of three standards of review. When a statute is based upon a "suspect classification" or impairs a "fundamental

right," a court will apply strict scrutiny. McGrath v. Rhode Island Retirement Bd., 906 F. Supp. 749, 767 (D.R.I. 1995). When a law involves classifications based on gender and illegitimacy, intermediate scrutiny is utilized. See e.g. Craig v. Boren, 429 U.S. 190 (1976), reh'g. denied, 429 U.S. 1124 (1977). In all other cases, a court applies the rational basis test. Terre v. Boraas, 416 U.S. 1 (1974); Lakewood Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood, 699 F. 2d 303 (6th Cir.), cert. denied, 464 U.S. 815 91983). Under the rational basis test, a statute will be upheld if there is a rational relationship between the classification and some legitimate government purpose. New Orleans v. Dukes, 427 U.S. 297 (1976). The rationale need not be expressed in the statute . Nordlinger v. Hahn, 505 U.S. 1 (1992). Indeed, a classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. F.C.C. v. Beach Comm., Inc., 508 U.S. 307, 313 (1993).12

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12 Plaintiff cites to the case of 77th District Judge v.

The burden is on the party attacking the statute to

State of Michigan, 175 Mich. App. 681 (Mich. App. 1989), to guide this court in reviewing his equal protection challenge. The plaintiff in that case challenged a statute which drew lines based solely upon a judge's geographic location and which gave judge sin the 36th District preferential treatment. The court in 77th District Judge applied a "means scrutiny test," which is a more stringent standard than the rational basis test, and found such classification unconstitutional since it was completely arbitrary.

This court will not apply the "means scrutiny" standard used by the Michigan Court of Appeals in 77th District Judge for two reasons. First, in 77th District Judge, the plaintiff challenged the statute under the Equal Protection Clauses of the Constitutions of the United States and the State of Michigan. This case entails a challenge solely under the Equal Protection Clause of the Constitution of the United States. Secondly, the Michigan Supreme Court has used the rational basis test

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negate every conceivable basis which might support the statute. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973), reh'g denied, 411 U.S. 910 (1973). A state does not have any obligation to produce evidence to support the challenged statute; rather the statute may be defended based upon "rational speculation." Beach Comm., 508 U.S. at 313.

The challenged law must be afforded a strong presumption of constitutionality. Hodel v. Indiana, 452 U.S. 314 (1981). It is not up to the court to judge the wisdom and desirability of the legislative determinations reflected in the challenged statute. Dukes, 427 U.S. at 297. Nor can the court strike down the statute because it is not drawn with methodical nicety or because in

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in equal protection analyses of retirement systems. Hughes v. Judges' Retirement Board, 407 Mich. 75, 92-95 (Mich. 1970); Burgess v. Detroit, 359 Mich 269, 280 (Mich. 1960) (cited in In re Pensions of 19th District Judges Under Dearborn Employees Retirement System, 213 Mich. App. 701, 705 (1995)).

practice it results in some inequity. Dandridge v. Williams, 397 U.S. 471 (1970).

The Judges Retirement Act clearly survives scrutiny under the highly deferential rational basis test. The classification scheme is rationally related to legitimate objectives. To understand why this is so, it is best to first examine the purpose which the Legislature was trying to achieve and next, how the classification scheme furthers this purpose.

First, the goal of the statute is legitimate. Setting a limitation on the pension award so that no member earns a pension of more than 66 2/3% of his or her final salary from all government sources combined, whether the recipient is a member of plan four, plan six, or plan seven, serves a plethora of legitimate purposes, such as ensuring the actuarial soundness of the plan, limiting the amount of member contributions so as not to impose a hardship on any individual member, regulating the expenditure of public monies, and guaranteeing litigants access to the courts by keeping probate filing fees (which fund the Judges Retirement System) at a minimum. See

e.g. In re Pensions of 19th District Judges Under Dearborn Employees Retirement System, 213 Mich. App. 701, 705 (Mich. App. 1995) (holding that"[r]estricting membership in [a retirement] plan to those not actively participating in other plans would ensure that funds were available for those employees not receiving any retirement benefits" was "rationally related to the city's desire to provide employees with retirement benefits on a long-term basis"). Second, in regard to the lines drawn by the Legislature, this advances the Legislature's purpose. In other words, the assignment of a probate retirant to one of three plans (four, six or seven) is rationally related to the goal of ensuring that each plan member retires with a total government pension of no more than 66 2-3% of his or her final salary. For instance, plan four members are part-time probate judges who are also private attorneys; such members are ineligible for participation in county retirement systems and these judges receive lower salaries than other probate judges. Taking into account all these characteristics, the Legislature reasonably determined

that appropriate maximum retirement annuity for a plan four member should be 60% of the judge's final average compensation. In contract to a plan four member, a plan seven member is a full-time probate judge who is not covered by a county pension plan and who has contributed 5-7% of his or her judicial salary each year. It is rational to afford these members a more generous ceiling of 66 2-3% of their final compensation than plan four members. And, as for plan six members, they are at no disadvantage over plan four and seven members. For example, although the county pensions of plan six members are taken into account and may result in a reduction of state benefits if the sum of the state and county pension exceeds 66 2/3% of their final average compensation, they enjoy a luxury not afforded to plan seven members, namely that a plan six member is not required to contribute more than $980 per year to the Judges Retirement System. Indeed, no contribution cap is placed upon the annual contributions of plan seven members. Plan seven members must contributed 5-7% of their salary each year period!

At the end of the day, the Legislature rationally arrived at a scheme which would ensure the legitimate end of ensuring that no judge achieved too generous a pension from government sources (e.g. a pension equivalent to 100% of his or her final salary). Also, the lawmakers' categorization is a reasonable means of attempting to place all plan members on an equal footing. This court rejects plaintiff's contention that plan four or seven members receive a larger total pension than plan six members, such as plaintiff. This court can reason as to why the Legislature chose to treat plan six members differently, and as to why they believed that classifying plan six members as such, would provide a good overall balance. As compare to plan four and seven members, plan six members either: (1) receive another governmental pension (e.g. county pension); and/or (2) have a higher final average compensation; and/or (3) make significantly smaller annual donations to the Judges Retirement System.

Plaintiff's next argument is that the Judges Retirement Act of 1992 discriminates between judges

who took office after 1976 and those who took office prior to 1976. Plaintiff claims that the probate judges who took their position on the bench after 1976 are at an advantage over probate judges who took their positions prior to 1976 because the former judges may make a choice as to whether to join the Judges Retirement and a county retirement system with full knowledge of the possibility that, upon retirement, their state pension could be reduced if the state pension when combined with the county pension exceeds 2/3 of the judges' final compensation. Plaintiff insists that judges who served prior to 1976 "do not have the choice to elect which or both (state or county) pension to pay into" but rather, "as a result of [1976 Amendment], their state retirement benefits are automatically diminished dollar for dollar (up to 40%) before the state will pay them a pension."

This equal protection claim is wholly unavailing. The Judges Retirement Act of 1992 does not classify based upon judges who joined the bench prior to or after 1976. In order to raise an equal protection claim, the statute must classify in this regard. Moreover, assuming

arguendo that it did so classify, the statute still survives an equal protection contest. As mentioned above, the structure of the statute is rationally related to legitimate ends. And, furthermore, although the plaintiff claims that his decision to join and send monies to the county and state pensions has been usurped by the combined state-county pension cap, this court finds that the statute in no way, shape or form diminished the right of the plaintiff, who served before 1976, to elect which pensions (state or county or both) to which he might subscribe and send contributions.13

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13 Plaintiff cites the case of Papasan v. Allain, 478 U.S 265 (1986) for the proposition that violations of equal

In sum, plaintiff's assertion that the Judges Retirement Act unconstitutionally classifies individuals is groundless. Essentially, plaintiff's contentions constitute nothing more than a complaint to the effect that he has served on the bench for 31 years and should thus receive more benefits from the state pension system than other judges with less tenure and who contributed less financially. Absent intentional, unreasonable discrimination, however, this allegation does not constitute a violation of his equal protection rights.

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protection are greatest when the issue is an unequal distribution of state benefits. In Papasan, the court was faced with the issue of whether variations in benefits received by school districts from one section were rationally related to a legitimate state interest. The Supreme Court never decided the issue of whether such distributions met the rational basis test, but remanded the issue for further proceedings. Because the Supreme Court never decided the equal protection issue, Papasan does not provide much guidance to this court in deciding

3. Whether Plaintiff's Contractual Rights Have Been Impaired

An additional stance of the plaintiff is that the 1976 Amendment visited an impairment of contract upon him in violation of Article I, Section 10 of the United States Constitution, which provides that "[n]o state shall. . . pass any . . . Law impairing the Obligation of Contracts." At the outset it should be noted that the plaintiff is not even receiving a benefit pursuant to the 1976 Amendment. Rather, plaintiff is receiving the maximum benefit afforded him ($12,500) under the Probate Judges Retirement Act prior to the 1976 revision. So, plaintiff's impairment of contract is irrelevant, inasmuch as he is receiving no benefit under the very statute he insists is impairing his contractual rights.

When examining plaintiff's claim for relief, however, it becomes apparent why this court is faced

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plaintiff's equal protection claim aside from providing the appropriate standard of review.

with a Contracts Clause issue. In his prayer for relief, plaintiff asks this court to apply a portion of the 1976 amendment to him in a way so as not to impair his contractual rights by severing a portion of the 1976 amendment which reduces his state pension on grounds of his substantial county pension. In particular, plaintiff seeks from this day forward a pension of $39,500 (the greater of $15,000 or 40% of his final salary) as provided for under the Judges Retirement Act of 1992 and he contends that this court should detach that portion of the Judges Retirement Act of 1992 which limits his state and county benefits to 2/3 of his final compensation. According to the plaintiff, prior to passage of the 1976 Amendment he did not have a "vested right" limited only to a $12,500 state maximum pension, but rather had a contractual right to a state pension equivalent to 40% of his final salary, and contends that severance would afford a solution to honor his alleged "vested right." 14 When he finally retired at the end of 1994, plaintiff alleges that his "vested right" to a pension in the amount of 40% his final salary was allegedly impaired. Plaintiff

maintains that severing the statute "is consistent with the legislative intent to attract personnel of high caliber to seek and occupy the Probate positions and to upgrade Probate Judges' state benefits to match the benefits of other judges."

This court holds that plaintiff's contractual rights were not impaired under the Contracts Clause of the constitution of the United States. First, prior to the passage of the 1976 Amendment, plaintiff's retirement "contract" provided for a $12,500 maximum pension, not a pension of 40% of his final salary. The 40% figure was added to the statute via an amendment in 1976. Thus, $12,500 was the only amount to which plaintiff had a "vested right," and the only right that this court must protect by ensuring that plaintiff does not receive a pension of less than $12,500.

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14 According to plaintiff's calculations, the maximum retirement allowance always afforded a probate judge prior to the 1976 Amendment was approximately 40% of his or her final salary.

Michigan case law supports this court's finding. On such case is Campbell v. Judge's Retirement Board, 378 mich. 169 (Mich. 1966). In that case, the Michigan Supreme Court was faced with a challenged to a 1961 amendment to the Judges Retirement Act, M.C.L. § 38.801, et. seq. (repealed), under the Contracts Clauses of the Constitutions of the United States and State of Michigan. Specifically, the amendment eliminated an escalator clause, which entitled a judge to a pension in the amount equal to one-half of the salary currently being paid to circuit judges. Under the Judges Retirement Act, as amended, a retiring circuit judge was to receive a pension in the amount of one-half of the salary being paid by the State to the judge at the time of his retirement. Plaintiffs sought a writ of mandamus seeking to require the JOB to pay retirement benefits based on the repealed escalator clause.

The court held that,

> a valid contract was entered into between judges and the State, and the State's agreement thereunder to pay the judges

> certain benefits created vested rights for the judges upon their retirement, that these are enforceable and cannot be impaired or diminished by the State. This should be deemed to include not only the benefits provided by statute at the time of entry into the contract and of retirement, but, also, those later added by statutory amendment. The legislature may add to but not diminish benefits without running afoul of the constitutional prohibition against impairment of the obligation of a contract.

Id. At 181-82. Ultimately, the court issued plaintiffs a writ.

Like the case of Campbell, 378 Mich. At 169, the plaintiff in this case acquired a "vested right" to $12,500, but he never acquired any such right to a sum greater than $12,500. As the Judges Retirement System is not diminishing his benefit to an amount below $12,500, plaintiff has suffered no impairment of his contract with

the State of Michigan.

Similarly, the case of Seitz v. Probate Judge's Retirement System, 189 Mich. App. 445 (Mich. App. 1991), lv. App. denied, 439 Mich. 946 (1992), provides substantial guidance to this court. In that case, the Michigan Court of Appeals confronted a challenge to the very portion of the Judges Retirement Act of 1992 which plaintiff disputes-the 2/3 limitation on state-county pensions. The plaintiffs were probate judges arguing that the 2/3 limitation impaired their contractual rights. The court disagreed and found that plaintiff's contractual rights were not impaired since all the plaintiffs in Seitz actually received a greater state pension after the 1976 amendments than they would have received prior to the amendments. In that respect, Seitz is unlike the instant case because the plaintiff in the instant case receives a lesser pension under the 1976 amendment than the pension he was entitled to prior to 1976.

Nevertheless, Seitz is instructive because the court discussed a hypothetical case of a probate judge who benefits would be reduced as a result of the 1976

amendments. Such hypothetical probate judge in Seitz exactly fits the description of the plaintiff in this case because plaintiff's benefits amount to only $5,600 under the 1976 amendment as opposed to $12,500 prior to the 1976 revision. The Seitz court concluded that such a reduction would violate the Contracts Clauses of the Constitutions of the State of Michigan and the United States. The remedy was defined by the court as "requiring] the state to honor the more generous benefit to be paid under the provisions of the statute before amendment." Id. at 452. The court concluded that "with respect to judges who were judges of probate before the effective date of the 1976 act, those judges are, at a minimum, entitled to the state pension benefit which would have been paid before the 1976 amendment, namely three percent of the final salary times year s of service, to a maximum of $12,500." Id. at 451-52. To be sure, this is precisely what the Judges Retirement System did in the present case-provided plaintiff with $12,500-the "more generous benefit to be paid under the provisions of the statute before amendment." Id. at 452.

Since plaintiff is currently receiving $12,500, his contractual rights have not been impaired because they have not been diminished.

Second, this court can not sever the 2/3 limitation from the Act and provide plaintiff with a pension equivalent to 40% of his final compensation.15 If the court found that application of the 1976 Amendment was unconstitutional, then it would be required to strike down the entire Act, not merely the 2/3 limitation.

Whether an unconstitutional provision is severable is a question of state law. Affiliated Builders and Contractors v. Perry, 869 F. S.p. 1239, 1254 (E.D. Mich. 1994). Under Michigan law, a court can sever a statute only when it would be reasonable to do so in light of the act as originally drafted. See M.C.L. § 8.5. The entire statute must fall if the unconstitutional portion is so intertwined with the remainder of the statute that it is

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15 It should be noted that the court in Seitz, 189 Mich. App. 445 (Mich. App. 1991), did not reach the issue of severance.

apparent that the Legislature would not have passed the act without the unconstitutional portion. People v. Sherry & Hutchinson Co., 197 Mich. 532, 543 (1917).

It is clear to this court that the Michigan Legislature would not have passed the 1976 Amendment without the 2/3 limitation. Such a limitation was a legislative compromise. In 1976, the Legislature increased the maximum benefit allowable from $12,500 to the greater of $15,000 or 40% of the judge's final average compensation. This is reflected at § 16 (1)(b) of the 1976 amendment (now incorporated at section 503(d) of the Judges Retirement Act of 1992). That year, the Legislature simultaneously determined that not all judges should receive 40% of their final average compensation or $15,000. Rather, Michigan lawmakers thought $15,000 or 40% would be too generous in certain instances in which retired probate judges were also collecting pensions from the counties in which they served. Accordingly, the Legislature decreed that the maximum combined state-county pension could amount to no more than 66 2/3% of the judge's final

compensation. This 2/3 limitation is reflected at § 16(1)(c) of the 1976 amendment (currently contained at section 503(d) of the Judges Retirement Act of 1992). By limiting the state pension of the judges who collect a state and county pension (plan six judges), the Legislature brought the total pensions awarded to the plan six retirants in line with the total pensions awarded to judges of different plans, such as plan four judges and plan seven judges, who collect no county pension. In sum, this court finds that the Legislature's intent would be defeated if this court severed the statute in accordance with plaintiff's desire because the 40%/$15,000 is inextricably intertwined with said 2/3 limitation. Summary judgment must be granted to defendants on plaintiff's Contracts Clause claim.

4. Whether There Has Been an Unconstitutional Taking of Plaintiff's Property

The plaintiff asserts that he has been unconstitutionally deprived of his property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Plaintiff

contends that he made mandatory contributions to the Judges Retirement System from 1976 through the date of his retirement in 1994 in the amount of $18,600, and that he is not obtaining the full benefit of these 18 years worth of contributions. Plaintiff asserts that in order for him to receive the full benefit of his contributions, the state must provide him a yearly pension of $39,537.20 (or 40% of his final salary), but by virtue of the statutory cap which limits his combined state-county pension to 2/3 of his final salary, the state will only provide him a pension of $5,609.70. In essence then, plaintiff is asserting two takings claims. First, plaintiff claims that his contributions into the state pension system from 1976 through 1994 were unconstitutionally taken because these contributions did not result t in any increased benefit to him over the 18 year period. Second, he claims the state is taking $33,927.50 ($39,537.20 less $5,609.70) of his property per year by offsetting its alleged liability to plaintiff with the liability owed to plaintiff by the county under his county pension.

As for plaintiff's second claim, it can be

summarily dismissed. Plaintiff is contesting the diminution in his pension from approximately $38,000 to $5,600 at provided for in the Judges Retirement Act of 1992 as an unconstitutional taking. However, plaintiff is not receiving a pension under this 1992 law. Rather, plaintiff is receiving $12,500-the maximum benefit permitted by the statute as it existed prior to 1976. The state is no "offsetting its liability" by the county pension in any way. Thus, this court is left to decide whether plaintiff's property was taken without just compensation where the plaintiff made mandatory contributions into the fund from 1976 until he retired, but did not receive any increased pension benefit.

As a preliminary matter his court finds that plaintiff did not make mandatory contributions into the fund for 18 years, or since 1976. This is an erroneous statement. Actually, plaintiff only made mandatory contributions into the system for the 10-11 years following the 1976 amendment. In calculating how much he has contributed into the fund from 1976-1994, plaintiff must take into account the refund he received in

November, 1995 for the most recent 7 years, 8 months and 24 days worth of contributions.

Moreover, plaintiff attempts to persuade this court that the Takings Clause protects "judicial compensation against all forms of diminishment" by citing the cases of U.S. v. Hatter, 64 F.3d 647 (Fed. Cir. 1995) and Evans v. Gore, 253 U.S. 245 (1920). However, even a cursory examination of these two cases reveals that they are wholly inapplicable to the case at hand. The cases of Hatter and Evans confront the issue of whether new taxes can be imposed on Article III federal judges after they have taken office. The Takings Clause was not even at issue in these cases, but the courts in Hatter and Evans dealt solely with the Compensation Clause of the United States Constitution, which states:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at state Times, receive for their services a Compensation, which shall not be diminished during their Continuance in

Office.

U.S. Const. Art. III, § 1. The judges in Hatter and Evans were federal judges, not state probate judges. The judicial compensation of a state probate judge is not guaranteed by the Constitution of the United States, as the plaintiff proposes in his brief.16

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16 In the same vein, the government cites the cases of Mizquiz v. City of San Antonio, 520 F.2d 993 (5th Cir. 1975), aff'd on other grounds, 528 F.2d 499 (5th Cir. En banc 1976), vacated and remanded, 438 U.S. 901, aff'd on other grounds, 586 F.2d 529 (5th Cir. En banc 1978), Hess v. St. Joseph Police Pension Fund, 788 F. 2d 1344 (8th Cir. 1986) and United States v. Sherry Corp, 493 U.S. 52 (1989), which are all inapplicable to the case at hand. First, Mizquiz and Hess are distinguishable from the instant case. In Mizquiz and Hess, the court was faced with the issue of whether eliminating the pensions of employees after they left government service constituted a "taking" under the Fifth Amendment where the employees had made contributions to the government

That said, this court finds that regardless of whether plaintiff contributed for 10 or 18 years and

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pension fund before they departed from their government jobs. The courts concluded that the elimination of former employee pensions did not constitute a "taking" because in return for their contributions to the pension fund while they were employed, the employees received a "disability" benefit. In essence, the government employees were receiving insurance in the form of a "disability benefit" for their contributions during their government tenure.

At a cursory glance, the Mizquiz and Hess may seem on point. This is because the plaintiff in the instant case, like the plaintiffs in Mizquiz and Hess, was entitled to a disability benefit in return for his contributions. However, upon further examination of these cases, it becomes readily apparent that the instant case is distinguishable from Mizquiz and Hess. First, unlike the plaintiffs in Mizquiz and Hess, the pension of the plaintiff in the instant case was not eliminated. Plaintiff

irrespective of the case law cited in plaintiff's brief, plaintiff's taking claim lacks merit for several reasons

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is currently receiving a $12,500 annual pension from the state. Second, Mizquiz and Hess are different from the case at hand because plaintiff in the instant case was a "vested member" of the Judges Retirement System and therefore could have retired in 1976 and claimed the maximum pension available to him ($12,500), regardless of whether or not he was physically or mentally disabled.

Likewise, another case cited by government, Sherry, 493 U.S. at 52, is not directly on point. In Sherry, the issue was whether the federal government could deduct a percentage of the monetary award that Sherry Corporation received from the government of Iran after a hearing before a special tribunal. Sherry was forced to bring its claims before the tribunal, as opposed to a court, due to federal legislation, but also was forced to pay the United States government a percentage of its award in order for the United States government to recover some of the cost associated with the tribunal.

First, this court finds that plaintiff's "property" has not been taken by the government, which is an essential element of a takings claim. "The Fifth Amendment of the Constitution of the United States provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. Applicable to the states through the Fourteenth Amendment, see e.g. Webb's Fabulous Pharmacies, Inc.

The court held that the federal government's deduction did not violate the Takings Clause.

Defendant cites Sherry for the proposition that "unlike real or personal property, money is fungible" and the deduction in the percentage of a monetary award does not amount to a "physical appropriation of property" under the Takings Clause. While this was true in Sherry, it is also true that "contract rights" are a form of property so if plaintiff in the instant case had a contractual right to increased benefits, then the alleged taking of his money without affording him these rights could constitute an unconstitutional deprivation.

v. Beckwith, 449 U.S. 155, 160 91980). McGrath v. Rhode Island Retirement Board, 906 F. Spp.. 749, 769 (D.R.I. 1995), aff'd., 88 F.3d 12 (1st Cir. 1996). In order to prevail on a takings claim, the court first must determine if any "property" is even involved in the claim. The plaintiff seems to be arguing that he had a "contract right" to increased benefits over the years, which if true would satisfy the "property" element of a takings claim. "Contract rights are as much private property under the Takings Clause as they are under the Due Process Clause," Id. (citing Ruckelshaus v. Monsata Co., 467 U.S. 986 (1984)). Yet, this court previously found that plaintiff had no "contractual" right to any benefit in excess of $12,500, so plaintiff's taking claim must be dismissed accordingly.

Assuming arguendo, that an increase in his benefits was a contractual right, and thus "property," plaintiff's eminent domain claim still fails. This court finds that plaintiff's "property" has not been taken unconstitutionally. In evaluating whether the amendment constituted a "taking," the court must consider three

factors of "particular significance": (1) "the economic impact of the regulation on the claimant;" (2) "the extent to which the regulation interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224-25 (1986). See also Parker v. Wakelin, 937 F. Spp.. 46, 58 (D. Maine 1996). Application of these three factors shows that plaintiff's property was not taken without just compensation. First, the economic impact of the 1976 amendment on the claimant has been slight. Plaintiff made contributions to the system for 24 years, including making contributions of approximately $980 a year for an estimated 10 years since the date of the 1976 amendment. In return, plaintiff is receiving a $12,500 annuity. Second, in regard to the amount of interference with plaintiff's investment-backed expectations, this court also finds the impediment minimal. The fact of the matter is that plaintiff's combined state and county pension amounts to in excess of 66 2-3% of his final salary, and thus exceeds the pension all other judges are

receiving form the Judges Retirement System. Any expectancy that plaintiff would receive an amount equal to 40%-100% of his final salary from the state and county upon retirement was completely subjective. And, the plaintiff was never guaranteed that the pension formula would not change. Indeed, as a probate judge who was familiar with the law, he was placed on notice of the revision 20 years ago, but nevertheless chose not to retire and take his $12,500 state pension at that time. Louisville & Nashville RR. Co. v. Mottley, 219 U.S. 467 (1911) (finding no vested right in an existing law which precludes the law from being altered). In regard to the third element, this court finds the character of the action taken by the Legislature in amending the Probate Judges Retirement Act in 1976 to be a regulation, as opposed to a physical invasion. Thus, this third factor weighs against finding a taking. In sum, this court holds that plaintiff's private property was not taken without just compensation.

5. Whether Plaintiff Has Been Deprived of His Rights Under 42 U.S.C. §§ 1981 and 1983

In this complaint, plaintiff's final challenge to the statute is premised upon federal civil rights statutes 42 U.S.C. §§1981, 1983. Since filing his complaint, plaintiff has seemingly conceded that he has no claim under 42 U.S.C. § 1981. And, indeed this court holds that plaintiff has no cause of action under 42 U.S.C. § 1981. In order to bring a claim under title 42, section 1981 of the United States Code, plaintiff must allege racial discrimination, which is not an issue here. 42 U.S.C. § 1981 ("all persons. . . shall have the same right. . . to make and enforce contracts. . . as is enjoyed by white citizens . . ."). See also Johnson v. Railway Express Agency, 421 U.S. 454 (1975). Plaintiff still claims, however, that he has a valid claim under 42 U.S.C. § 1983 because he allegedly has been deprived of his constitutional right to procedural due process in his hearing before the JOB. As this court has previously determined in this opinion that plaintiff was not denied procedural due process at his hearing before the JOB, plaintiff's 42 U.S.C. § 1983 claim must be dismissed.

ORDER

Therefore, it is hereby **ORDERED** that defendants' motion for summary judgment is **GRANTED**, and plaintiff's case be dismissed with prejudice.

SO ORDERED.

Dated: 1/24/97

PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION

Sixth Circuit Case №. 97-1241
Filed April 23, 1996

Pages C-1 thru C-8

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

GEORGE E. BENKO,

Plaintiff, Civil Action No. 95-40467

v. HONORABLE PAUL V. GADOLA

JUDGES' RETIREMENT SYSTEM,

JAMES NEUBECKER, U.S. DISTRICT JUDGE

GORDON LINDSAY,

LYLE VAN HOUTEN AND

MILTON FIRESTONE, jointly and severally,

Defendants.

_____/

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff moves for reconsideration, pursuant to Local Rule 7.1 (h), which provides, in part:

Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication,

shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Plaintiff first asserts that the motion for reconsideration should be granted because this court issued an order before plaintiff could submit a supplemental brief. This brief, plaintiff contends contains arguments that would have changed the court's opinion. In reality, that response did not contain any new arguments. Although this court, in its opinion, did not address each and every case cited by plaintiff in his brief, this court is now expressly stating that it considered all of plaintiff's arguments and properly found them to be without merit.1

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1 Specifically, Poindexter v. Greenhow, 114 U.S. 270 (1885), does not stand for the broad proposition that Eleventh Amendment immunity necessarily fails in the face of a Contracts Clause claim. The court in

Further, plaintiff has no right to have this court

Poindexter held that a state employee could be sued in his individual capacity, in state court, for tortious actions taken outside the proper scope of his official capacity. It further held that the Eleventh Amendment immunity of a state does not prevent a court, in a suit against a state official, from ruling that a state statute is unconstitutional. In other words, Poindexter stands for the following important proposition: when a federal court, in a particular case over which it otherwise has jurisdiction consonant with the Eleventh Amendment (e.g., a suit against a state official), is called upon to rule on the constitutionality of a state statute, the suit is not thereby transformed into a suit against the state itself, which would be barred by the Eleventh Amendment.

Applying that proposition to the present case, this court will still be able to rule on the constitutionality of the reduction of plaintiff's benefits, while adjudicating the claims against the state officials.

In short, Poindexter does not create an exception

consider anything other than plaintiff's initial brief in response to defendant's motion, if timely filed and in compliance with local rules. Had plaintiff filed her supplemental brief after oral argument, but before this court issued a decision, this court still would not have considered it. Otherwise, this court would be inundated by a continual stream of supplemental pleadings, whenever lawyers thought of new ways (or not so new ways) of presenting their arguments. Plaintiff was provided the opportunity to full brief the issues in his response to defendants' motion and was not entitled to

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to the Eleventh Amendment for Contracts Clause cases. The utter lack of merit in plaintiff's argument to the contract becomes obvious when one considers that the seminal case of Hans v Louisiana, 134 U.S. 1 (1890), decided a mere five years after Poindexter, involved a Contracts Clause claim. In Hans, of course, the Contracts Clause action was barred by the Eleventh Amendment.

file any further briefs. The fact that defense counsel, at oral argument, cited a case that was not mentioned in his brief does not change this. Oral argument is supposed to be more than a rereading of the briefs already filed before the court.2

The only new information produced by plaintiff is data demonstrating that currently, through prudent investment, the Judges' Retirement System has enough money from judges' contributions to meets its current needs. Thus, at the current time, judgment may very well not come out of the state treasury. This does not

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2. Plaintiff also argues that the supplemental brief should have been considered because adequate time was not given at oral argument for all of the arguments to be addressed. In fact, oral argument in this matter lasted for thirty minutes. This does not include time spent before oral argument on the issue of recusal. Thirty minutes is more than enough time for two well-prepared and organized counsel to cogently present their opposing arguments in a case such as this.

preclude the possibility that in the future state funds will need to be used.3 As previously discussed by this court, the Judges Retirement System does receive state funds. Further, all other factors considered by this court lead to the conclusion that the JRS is an arm of the State of Michigan.

With regard to plaintiff's pendent state claims, this court is clearly without subject matter jurisdiction over them. Pennhurst State Sch. & Hosp. V. Halderman, 465 U.S. 89 (1984). They were properly dismissed. They must be heard, if at all, in state court, consistently with state statute of limitation.

Plaintiff's protestations notwithstanding, this court has not been misled, thus creating a palpable defect, the correction of which would result in a different outcome. Plaintiff primarily rehashes arguments that

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3. One need only look at the recent travails of Orange County, California, to realize that current financial stability in no way guarantees future financial stability.

have already been rejected by this court.

ORDER

Therefore, it is hereby **ORDERED** that plaintiff's motion for reconsideration be **DENIED**.

SO ORDERED.

Dated: 4/23/96

PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ORDER GRANTING IN PART DEFENDANT'S
MOTION FOR DISMISS

Sixth Circuit Case Nº. 97-1241
Filed March 18, 1996

Pages D-1 thru D-16

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

GEORGE E. BENKO,

Plaintiff, Civil Action No. 95-40467

v. HONORABLE PAUL V. GADOLA

JUDGES' RETIREMENT SYSTEM,

JAMES NEUBECKER, U.S. DISTRICT JUDGE

GORDON LINDSAY,

LYLE VAN HOUTEN AND

MILTON FIRESTONE, jointly and severally,

Defendants.

_____/

ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS

Plaintiff brings this suit alleging that defendants have improperly calculated plaintiff's pension benefits in violation of state and federal law. The crux of plaintiff's complaint is that a 1976 Michigan statute that limits his benefits is unconstitutional as applied to him. Plaintiff claims entitlement to greater benefits than he is currently

receiving. Plaintiff seeks (1) an award for benefits that he allegedly should have received since his retirement and (2) and order from this court requiring defendants to pay plaintiff higher benefits in the future.1 Defendants bring this motion to dismiss, arguing that the Eleventh Amendment precludes this court from entertaining plaintiff's claims. Oral argument was held on this motion on March 13, 1996. For the following reasons, this court will grant in part defendants' motion to dismiss.

I. Factual Background

Plaintiff was appointed a probate judge in 1963 and held that position until December 31, 1994, when he retired. Plaintiff voluntarily joined the Probate Judges' Retirement System (hereinafter "PJRS") in 1963. It is undisputed that funds of the PJRS were, by statute, kept

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1 During oral argument on this motion, plaintiff was granted leave to amend his complaint to unequivocally request future injunctive relief from this court.

entirely separate from the funds of the State of Michigan. In 1993, the PJRS became the consolidate Judges' Retirement System (hereinafter "JRS").

The JRS is controlled by the Judges Retirement Act of 1992, M.C.L. sec 38.2101-38.2608. Pursuant to M.C.L. sec 38.2202(1), the members of the board of the JRS include: the Sate Treasurer, the State Attorney general, the Deputy Legislative Auditory General, and two members appointed by the Governor. Pursuant to MCL sec 38.2207, the JRS is represented in legal matters by the state attorney general. Pursuant to MCL sec 38.2205, the Department of Management and Budget is responsible for the budgeting, procurement, and related management functions of the JRS. Pursuant to MCL sec 38.2206, the funds of the JRS are to be treated by the State Treasurer in the same manner as state funds. MCL sec 38.2208 states that "the Retirement System shall draw its warrants upon the state treasury, payable out of funds of the retirement system, for the payment of retirement allowances, accumulated contributions, and the payment of salaries and other expenses necessary in

the administration of the retirement system." MCL sec 38.2302 requires the state legislature to annually provide funds to the JRS. At oral argument, plaintiff conceded that since 1992, the State of Michigan has provided about 3% of the JRS's funds. Further, pursuant to M.C.L. sec 38.2304, the State of Michigan provides the JRS with various court fees collected by it.

In 1976, the State of Michigan enacted a statute which altered the manner in which retirement benefits for probate judges were calculated. Plaintiff's benefits had allegedly vested prior to the enactment of the 1976 amendment. The effect of this amendment, which plaintiff now seeks to avoid, is to reduce plaintiff's benefits. In order words, plaintiff alleges that he would currently be receiving greater retirement benefits had the 1976 amendment never been enacted.

II. Analysis

The Eleventh Amendment states, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the Untied States by Citizens

of another State, or by Citizens or Subjects of a Foreign State." This provision also applies to suits brought by a person against his own state. Edelman v. Jordan, 415 U.S. 651 (1974); Hans v. Louisiana, 134 U.S. 1, 15 (1890). The Eleventh Amendment serves as a constitutional limitation on the subject matter jurisdiction of federal courts. See Pennhurst State Sch. & Hosp. V. Halderman, 465 U.S. 89, 98 (1984).

A. Claims Against the JRS

The Eleventh Amendment applies to states being sued in federal court. Thus, the first issue raised by this suit is whether the JRS is considered part of the State of Michigan, for purposes of the Eleventh Amendment.2

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2. Surprisingly, the issue of whether the JRS is an arm of the State of Michigan for purposes of the Eleventh Amendment is one of first impression. Many other states, however, have ruled that various public employee retirement systems were arms of a state for Eleventh Amendment purposes. See, e.g., Tew v. Arizona State Retirement Sys., 873 F.2d 1400 (11th Cir. 1989); Kestler

This is a fact-intensive determination, with several factors being considered. See e.g. 13 Wright, Miller & Cooper, Federal Practice and Procedure sec 3524, at 134-148 and cases cited therein. The most important factor is whether any judgment would be paid out of state funds. Id. At 135-36 & n.31. Other factors include: whether the state government exerts significant control over the JRS's actions and decisions; whether the state executive branch appoints the JRS's policy makers; whether the state law characterizes the JRS as a state agency; whether the JRS is performing a governmental or a proprietary function; and whether the JRS has the ability to sue and be sued independently of the state. Id.

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v. North Carolina Local Governmental Employees Retirement Sys., 808 F. Supp. 1220 (W.D.N.C. 1992); Grossman v. Suffolk Cty. Dist. Attorney's Office, 777 F.Supp. 1101 (E.D.N.Y. 1991) (New York State Employees Retirement System); Reiger v. Kansas Public Employees Retirement Sys., 755 F. Suppl 360 (D. Kan. 1990).

At 134-35 & n.30; Erwin Chemerinski, Federal Jurisdiction sec 7.4 at 388 (2d Ed. 1994).

Applying these factors to the JRS, this court is convinced that the Eleventh Amendment does apply to the JRS. The State of Michigan exerts great control over the JRS. The board members are either high-level state officials or are appointed by the Governor, the JRS is represented by the attorney general in legal proceedings, and the Michigan Supreme Court has referred to the JRS board as "acting for the State," in Campbell v. Judges' Retirement System, 378 Mich. 169, 179-81 (1966). Further, in Colton v State Treasurer, 205 Mich. App. 396 (1994), the Michigan Court of Appeals held that "the investment of retirement system funds is a governmental function mandated by the Michigan Constitution and various statutes." Id. At 397-98. These factors all weigh in favor of viewing the JRS as an arm of the State of Michigan.

Most importantly, however, a judgment against the JRS will be drawn in part from funds of the State of Michigan. It is certainly true that the vast majority of

JRS funds were contributed by individual judges and counties within Michigan. It is also true that the funds of the PJRS, to which plaintiff belonged and contributed for many years, were completely separate from the funds of the State of Michigan.3 Nevertheless, at the present time, the State of Michigan does provide funding to the JRS. M.C.L. sec 38.2302. This was conceded by plaintiff at oral argument. Thus, an award from the funds of the JRS will draw in part from the state treasury.

Plaintiff makes two arguments in an attempt to avoid application of the Eleventh Amendment to the JRS, in spite of its receipt of funding from the State of Michigan. First, plaintiff argues that this court should

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3 In fact, a Michigan statute, since repealed, expressly prohibited appropriations from the State of Michigan's general fund to the PJRS. Accordingly, it is likely that the Eleventh Amendment would not have applied to the PJRS. See e.g., Consolidated Rail Corp. V. Nevins-Patrillo Warehouse & Distrib. Sys., Inc., 501 F.Supp. 27, 28 (S.D.N.Y. 1980).

treat this as a suit against the PJRS because plaintiff's pension benefits vested when he belonged to the PJRS. While the premise of this argument may be true, this court is aware of no case law ion support of plaintiff's conclusion. The PJRS is no longer in existence. The statutes creating the PJRS have been repealed and replaced with the Judges Retirement Act of 1992. The JRS is the entity being brought before this court. This court has no choice but to treat this suit as one against the JRS, an entity that receives funds from the state treasury.

Second, plaintiff argues that the State of Michigan has waived its Eleventh Amendment immunity through M.C.L. sec 38.2605-06, which transfer all rights enjoyed by members of the PJRS to members of the JRS. Plaintiff asserts that because the Eleventh Amendment did not apply to the PJRS, members of the JRS had the ability to sue for their benefits in federal court. Plaintiff further argues that by transferring all rights under the PJRS to the JRS, the State of Michigan transferred to members of the JRS the right to sue in federal court. In

effect, plaintiff argues that M.C.L. sec 38.2605-06 express Michigan's intent to allow the JRS to be sued in federal court.

Perhaps paradoxically, because the Eleventh Amendment is viewed as a jurisdictional provision, a state otherwise protected by the Eleventh Amendment may consent to be sued in federal court. Atascadero State Hosp. V Scanlon, 473 U.S. 234, 238 (1985); Hans v. Louisiana, 134 U.S. at 20. Courts use a stringent test, however, in determining when a state has waived its Eleventh Amendment immunity. Atascadero, 473 U.S. at 241. Waiver occurs "only where stated 'by the most express language or by . . . overwhelming implications from the text [of the statute]. . .'" Edelman, 415 U.S. at 673 (citation omitted). In the present case, the statutes to which plaintiff refers to do not expressly or impliedly transfer to members of the JRS the ability to bring suit in federal court. The rights referred to in the statutes are rights to collect benefits, not rights to bring suit in federal court. Accordingly, plaintiff's waiver argument based on the Judges Retirement Act of 1992 must fail.

In sum, most, if not all, of the factors considered by this court lead to the conclusion that the JRS is an arm of the State of Michigan for Eleventh Amendment purposes.4 Accordingly, this court holds that the Eleventh Amendment applies to the JRS. Plaintiff's claims against the JRS will be dismissed for lack of subject matter jurisdiction.

B. Claims Against the Board Members

The Eleventh Amendment does not bar all suits against state officials. In the landmark case of Ex parte Young, 209 U.S. 123 (1908), the Supreme Court held that state officials may be sued for injunctive relief to

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4. Plaintiff relies heavily, both in his brief and during oral argument, on the case of Marvel v. Dannemann, et al., 410 F.Supp. 170 (D. Del. 1980) to support his argument that the Eleventh Amendment does not apply to entities like the JRB when violations of the Contract Clause are alleged. While Marvel may present facts similar to the present case, nowhere in that opinion is the Eleventh Amendment mentioned. There is no evidence

prevent future violations of federal law. This is true even if the injunctive relief would cost the state money. E.g. Edelman v. Jordan, 415 U.S. 651 (1974). A federal court may not, however, award retrospective relief against state officials in their official capacity. Id. Thus, since the board members are being sued in their official

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that the court considered an Eleventh Amendment challenge to jurisdiction to that case. The Eleventh Amendment is not "jurisdictional in the sense that it must be raised and decided by th[e] court on its own motion." Patsy v. Board of Regents of Fla., 457 U.S. 496, 516 n. 19 (1982). Thus, since the Marvel court had no obligation to raise Eleventh Amendment issues sua sponte, this court cannot assume that Marvel was impliedly making any statement about Eleventh Amendment immunity. In short, the Marvel opinion sheds no light on Eleventh Amendment immunity.

capacities,5 this court may only award the injunctive relief requested, i.e., an order forcing the board to pay plaintiff higher benefits in the future, but may not award the retrospective relief requested, i.e., the money that plaintiff asserts he should have received in the past. Accordingly, the claims for past-due benefits will be dismissed for lack of subject matter jurisdiction.

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5. Plaintiff asserts that the board members are being sued in their official and individual capacities, but that assertion is not borne out by the complaint. The gravamen of plaintiff's complaint is that the board members are, by virtue of their positions on the JRS, enforcing a statute that is unconstitutional as applied to plaintiff. Plaintiff wants this court to hold the statute unconstitutional. Plaintiff begins his complaint:

1. The plaintiff challenges the Michigan Compiled law 38.916(1)(C). . . because the Act violated: a) the United States Constitution. . .c). . . 42 U.S.C. section 1981, 1983, et seq.

C. Pendent State Law Claims

In Pennhurst State Sch. & Hosp. V. Halderman, 465 U.S. 89 (1984), the Supreme Court held that the Eleventh amendment bars all pendent state-law claims against state officials from being heard in federal court. Accordingly, plaintiff's pendent state law claims will be dismissed.

The focus of the complaint is the statute, not misconduct by the board members. It is clear that any money paid to plaintiff as a result of this suit would not be paid out of the board members' own pockets. Further, in the Sixth Circuit, there is a presumption that state officials are being sued in their official capacity unless the complaint expressly states otherwise. Wells v. Brown, 891 F.2d 591 (6th Cir. 1989). Plaintiff's complaint does not state that the board members are being sued in their individual capacities. This court is convinced, and plaintiff did not disagree at oral argument, that the board members are being sued in their official capacities.

D. Summary

Therefore, the only claims that should proceed before this court are federal claims, brought against the board members of the JRS, requesting future injunctive relief, i.e., an order from this court that defendants pay plaintiff higher benefits in the future.

ORDER

Therefore, it is hereby ORDERED that defendants' motion to dismiss be GRANTED IN PART. All claims against Judges' Retirement System are hereby DISMISSED for lack of subject matter jurisdiction. All claims asserting violations of state law or seeking retrospective monetary relief are hereby DISMISSED for lack of subject matter jurisdiction.

SO ORDERED.

Dated: 3/18/96

PAUL V. GADOLA
UNITEDSTATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
STATE OF MICHIGAN
JUDGE'S RETIREMENT BOARD

ORDER

Sixth Circuit Case №. 97-1241
Filed September 25, 1995

Pages E-1 thru E-3

STATE OF MICHIGAN

JUDGES' RETIREMENT BOARD

GEORGE E. BENKO

Petitioner,

v

JUDGES' RETIREMENT SYSTEM

Respondent.

_____/

ORDER

At a session of the Judges' Retirement Board held at 7150 Harris Drive, Lansing, Michigan, County of Eaton, on the 29th Day of September, 1995

The above-captioned cause was presented to the Board at its meeting of September 29, 1995 and the Board considered the testimony, exhibits, arguments of the parties, the report of the Hearing Officer and exceptions to the Hearing Officer's report.

Having found that there is insufficient evidence from which to conclude that Petitioner is entitled to an increase in retirement benefits as requested,

IT IS NOW THEREFORE ORDERED THAT the retirement benefit increase as requeted be and the same is hereby denied.

AND FURTHER, having found that there is sufficient evidence from which to conclude that Petitioner is entitled to a refund of contributions as requested,

IT IS ORDERED THAT a refund of contributions in the amount of $7,516.80 plus interest be paid to Petitioner as requested.

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Milton Firestone, Chairman